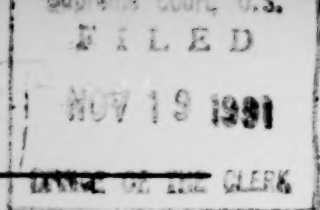


91-819

No.



In The

Supreme Court of the United States

October Term, 1991

RUTGERS, THE STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS, THE STATE UNIVERSITY; and
DR. EDWARD J. BLOUSTEIN, PRESIDENT,

Petitioners,

-v-

DR. ALFRED BENNUN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in a disparate treatment action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a court may make an inferential finding of intentional discrimination based solely upon its disagreement with the university-employer's subjective assessment of the plaintiff's academic qualifications for promotion.

PARTIES BELOW

The only parties to this proceeding in the court below were those indicated in the caption of this petition.

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No.

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RUTGERS, THE STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS, THE STATE UNIVERSITY; and
DR. EDWARD J. BLOUSTEIN,

Petitioners,

vs.

DR. ALFRED BENNUN,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

Petitioners, Rutgers, The State University of New Jersey; Board of Governors of Rutgers, The State University; and Dr. Edward J. Bloustein, respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-60a) is reported at 941 F.2d 154 (3d Cir. 1991). A petition for rehearing was denied over the dissent of the Chief Judge and another Circuit Judge in an order reported with the panel decision. *Id.* at 180-81 (App. 97a-101a). The opinion and orders of the District Court (App. 61a-96a) are reported at 737 F. Supp. 1393 (D.N.J. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1991 (App. 1a). A timely petition for rehearing was denied on August 21, 1991 (App. 97a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble

42 U.S.C. § 2000e-2(a) provides in pertinent part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

STATEMENT OF THE CASE

Dr. Alfred Bennun, a tenured associate professor of biochemistry, instituted an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, against Rutgers, The State University, its Board of Governors, and its President (jointly referred to as the "University"), alleging that he was denied promotion to full professor during the 1980-81 academic year because of his Hispanic ancestry. After a bench trial, the District Court for the District of New Jersey compared Dr. Bennun's subjective peer evaluations with those of other faculty members who were promoted (some in prior years) and, based on its own subjective evaluations, found that the University had applied different and harsher standards to Dr. Bennun. 737 F. Supp. at 1408-09 (App. 91a-93a). On that basis, the District Court found that the denial of promotion resulted from intentional discrimination and violated Title VII. *Id.* at 1409 (App. 93a). The affirmance of the Order of the District Court by the Court of Appeals is the subject of this petition.

A. The 1980-1981 Promotion Evaluation

The University makes promotion (and tenure) decisions based on five criteria: teaching effectiveness, research accomplishments, scholarly/creative activity, professional activity and general usefulness to the University. Promotion instructions issued by the University require that each evaluator apply his or her own subjective judgment in examining a candidate's qualifications under each of the five promotion criteria and make a composite assessment as to whether those qualifications as a whole merit promotion. Concerning promotion to full professor, evaluators are directed that candidates should have achieved "distinction" in one or more of the criteria and have made substantial progress beyond that which was recognized by promotion to the associate professor level.

Dr. Bennun was considered for promotion from associate professor to full professor during the 1980-81 academic year. The decision of the University's Board of Governors to deny promotion followed a series of evaluations and recommendations generated by the University's academic peer review system.

The full professors in Dr. Bennun's department recommended in favor of promotion by a 5-0 vote with one abstention, based upon their assessment of his qualifications in the five areas of activity specified in the University's promotion criteria. Applying the same criteria and reviewing the same qualifications, a college-wide committee of faculty members recommended against promotion by a 4-0 vote. The college dean recommended in favor of promotion. The University-wide biochemistry faculty, whose role was limited to evaluating achievements in research accomplishments and scholarly/creative activity, recommended against promotion by a 4-2 vote. The committee advisory to the President of the University, comprised of four distinguished faculty members and the three campus provosts, recommended that Dr. Bennun not be promoted. The President recommended to the University's Board of Governors that Dr. Bennun not be promoted, and the Board of Governors declined to award promotion.

B. The Trial

This matter was tried before the District Court for nine days between May 15 and December 19, 1989. Dr. Bennun testified concerning, *inter alia*, his qualifications and introduced into evidence, over the University's objection, the promotion packets of 27 faculty members who had been awarded promotion to full professor during the 1978-79 through 1984-85 period — including that of Dr. Ethel Somberg, who was promoted in 1978-79. The University adduced testimony from several of the faculty members and administrators who had evaluated Dr. Bennun, and from

witnesses who had participated in the evaluations of other professors, concerning the bases for their recommendations.

At the close of the trial, Dr. Bennun conceded that he had failed to adduce any direct evidence of discrimination. He contended, however, that his qualifications were equal to or better than those of Dr. Somberg and others who had been promoted and urged the District Court to compare his academic qualifications with those of the other professors and to conclude that the University could not have found him unworthy of promotion because it had promoted others with lesser qualifications. Further, Dr. Bennun urged the District Court to compare the subjective judgments of his evaluators with the judgments of the evaluators of the successful candidates and to conclude that his evaluators had applied different and more stringent standards to him than had been applied to the successful promotion candidates.

The University objected to both the qualifications and standards comparisons on the grounds that either analysis would inappropriately require the District Court to render judgments on the subjective evaluations of academic qualifications and result in the substitution of the District Court's judgments for those of the University's evaluators. Further, the University contended that, because the record showed numerous unquantifiable differences in both the qualifications possessed by Dr. Bennun and the successful promotion candidates and, significantly, in the identities of the evaluators who judged them, no finding of discrimination possibly could result from these comparisons. Thus, the University contended that the differences in treatment disclosed by such comparisons would reflect simply differences among the subjective judgments applied by the District Court and by the University's evaluators, variations among the subjective judgments of different University's evaluators, and differences among the qualifications being judged — not unlawful discrimination. Given

that Dr. Bennun had failed to adduce any evidence of discrimination apart from his disagreements with the evaluations themselves, the University contended that the record showed nothing more than a denial of promotion in the context of scholarly disagreement over the merits of Dr. Bennun's qualifications and that this evidence was insufficient as a matter of law to show pretext.

C. The Decisions Below

1. *The District Court.* The District Court acknowledged that it is not the court's role to substitute its judgment for that of the University's evaluators on subjective judgments relating to the merits of academic qualifications. 737 F. Supp. at 1409 (App. 92a-93a). However, noting that comparisons are often used in disparate treatment cases, even in the academic promotion context, and that universities are covered employers under Title VII, the District Court accepted Dr. Bennun's invitation to evaluate and compare his qualifications and evaluations with the qualifications of other candidates and their evaluations by their respective University evaluators. *Id.* at 1400 (App. 71a-72a).

The District Court attempted to focus its analysis upon quantifiable aspects of Dr. Bennun's qualifications, such as the number of publications he had written during a particular period of time, and then to isolate statements within his evaluations that appeared to opine upon his productivity as a scholar. The District Court then repeated this process in analyzing qualifications and evaluations of the other faculty members. It then purported to compare the words, *i.e.*, adjectives, that Dr. Bennun's evaluators had used in commenting about his productivity with the words that the evaluators of other faculty members had used in commenting about their productivity. Having concluded that it had isolated an instance in which some of Dr. Bennun's evaluators had described his productivity as "modest" and in which some

evaluators of another professor, who had fewer publications than Dr. Bennun, described the quantity of her research as "excellent," the District Court found that this "disparity" constituted an instance of disparate application of subjective standards. *Id.* at 1405 (App. 82a-83a). The District Court reached several of its findings based upon analogous analyses of other aspects of the credentials and evaluations of Dr. Bennun and the other professors. *Id.* at 1405-06, 1408-09 (App. 82a-85a, 91a-92a).

Having begun to scrutinize the subjective evaluations and to satisfy itself that it could isolate the subjective standards utilized by the University's scholars and draw conclusions about the evenhandedness of their application, the District Court then proceeded to perform *de novo* evaluations of the merit of academic credentials. Thus, for example, taking the testimony of the former Newark Provost that the University "expects . . . [that a promotion candidate] would have become an influential investigator on the national and international scene," the District Court examined the credentials of Dr. Somberg, who had been promoted in 1979, concluded that "[t]here was no evidence that she had an impact on the discipline or was an 'influential investigator on the national or international scene,' " and rejected the Provost's testimony as incredible for that reason.¹ *Id.* at 1405 (App. 84a, 96a).

1. Similarly, the District Court, noting that the University's Executive Vice President and Chief Academic Officer, T. Alexander Pond, testified that "to be promoted to full professor the candidate should be 'maturing as a scholar' and his/her work should have 'impact on the discipline at large and [a] level of recognition,' " assessed Dr. Somberg's research credentials and judged her "record . . . deficient when measured against this standard." *Id.* at 1405 (App. 84a). Although Dr. Pond did not arrive at the University until 1982, and participated in neither Dr. Somberg's 1978-79 evaluation, nor in Dr. Bennun's 1980-81 evaluation, the District Court found, inexplicably, that Dr. Pond's testimony showed that a harsher standard had been applied to Dr. Bennun than to Dr. Somberg. *Id.* at 1405, 1409 (App. 84a, 91a).

The District Court acknowledged that “for the comparison to be meaningful the individuals [to be compared] must be similarly situated.” *Id.* at 1400 (App. 71a-72a). However, rather than addressing the question whether a comparison could be made given that Dr. Bennun and the other professors had been evaluated, in most cases, by different groups of faculty members and that the extent of their achievements within the five promotion criteria varied widely, the District Court rejected or ignored those differences.² Rather, it focused on Dr. Somberg — the professor it viewed most similar to Dr. Bennun — and concluded that the University’s contention that those differences must not be ignored amounted to an unwarranted demand that individuals being compared be identical, not merely similar. *Id.* at 1400, 1406-07 (App. 71a-72a, 86a-87a).

2. *The Court of Appeals.* On appeal, the University contended that the District Court’s comparative analysis had failed to take into account the subjective nature of the evaluations and had ignored the undeniable impact that differences in qualifications and in the identities of evaluators necessarily had in explaining the differences in treatment. Thus, the University argued that the District Court’s analysis disregarded both settled precedent concerning judicial review of subjective academic decisionmaking and the basic assumptions underlying disparate treatment analysis and, therefore, erroneously failed to find from the University’s proofs that legitimate variations in subjective judgment and differences in the qualifications under comparison — rather than

2. For example, the University contended that Dr. Somberg and Dr. Bennun were not comparable because the evidence showed that the focus of her activities had been teaching, curriculum development, and program-building and that her achievements had been universally acclaimed as outstanding in those areas, but the focus of Dr. Bennun’s activities had been research and he had been evaluated, at best, as an average teacher who had done negligible curriculum development work or program-building.

unlawful discriminatory intent — explained the difference in treatment received by Dr. Bennun and the successful promotion candidates.

Failing to focus on the University's contention that the District Court's comparative findings were based solely upon its own subjective judgments about the merits of Dr. Bennun and the successful promotion candidates' academic qualifications, the Court of Appeals viewed the University's challenge to the District Court's analysis as a broad contention that academic institutions should be accorded a "special deference" that would shield them from any manner of comparative analysis. 941 F.2d at 173-75 (App. 43a-46a). Thus, relying on a previous Third Circuit decision which sanctioned a comparison of *objective* qualifications in the academic setting, *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), and upon this Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (holding peer review materials relevant to comparative analysis and discoverable), the Court of Appeals held that comparative analysis of peer review materials is appropriate. 941 F.2d at 173-75 (App. 43a-46a). However, the Court of Appeals did not address the University's contentions that the comparative analysis utilized in this case abandoned the principle of judicial restraint concerning *subjective* academic judgments set forth in *Kunda*. Thus, it permitted the District Court to make its own subjective judgments about the merits of academic qualifications.

The University further contended to the Court of Appeals that the District Court failed to account for the impact of the differences among the qualifications of Dr. Bennun and those of the successful promotion candidates and the differences in the compositions of their respective evaluative bodies and that those differences explained the disparate treatment. These differences formed a part of the University's legitimate, nondiscriminatory reason for the denial of promotion to Dr. Bennun. That is, the

University asserted that the University's evaluators had evaluated Dr. Bennun's research qualifications to determine whether they evidenced distinctive achievement because they judged his qualifications under the other criteria as lacking such distinction. Conversely, the University's evaluators had evaluated Dr. Somberg's research qualifications to determine whether they evidenced an acceptable level of achievement because they judged her qualifications in teaching effectiveness and general usefulness to the University as fulfilling the requirement of distinction. Thus, the University argued that, due to the differences in qualifications and resulting difference in evaluative perspectives, the comparative analysis performed by the District Court would, and did, necessarily identify differences in treatment caused directly by the differences in qualifications.

The Court of Appeals rejected these contentions, stating that, if differences in qualifications precluded a probative comparison, the "similarly situated" requirement would be transformed into one of "identically situated," and held that the District Court appropriately compared Dr. Bennun with Dr. Somberg and the other successful promotion candidates. *Id.* at 178 (App. 54a-55a). Although noting that different scholars had participated in the evaluations of Dr. Bennun and each of the other candidates and that the University had contended that the District Court's analysis erroneously ignored the role that variations among the subjective judgments of the different evaluators played in the various evaluations, the Court of Appeals did not address that contention separately. *Id.* at 177-78 (App. 53a-55a).

3. *Petition for Rehearing.* Following issuance of the Third Circuit panel decision, the University filed a petition seeking rehearing in banc based on the contention that the panel decision abandoned the doctrine of judicial restraint concerning subjective academic judgments enunciated by the Third Circuit in *Kunda v. Muhlenberg College*, *supra*, and acknowledged by this Court

in *University of Pennsylvania v. EEOC*, *supra*, and sanctioned the substitution of subjective judicial decisionmaking for subjective academic decisionmaking in discrimination cases. The Court of Appeals denied rehearing, over the dissent of Chief Judge Sloviter and Circuit Judge Roth. *Id.* at 180-81 (App. 97a-101a). In a Statement Sur Denial of Rehearing In Banc, the Chief Judge, who was the author of the majority opinion in the *Kunda* case, stated that "the majority's decision may be read to thrust the federal courts of this circuit into the subjective area of academic tenure and promotion decisions to an unwarranted and unprecedented degree." *Id.* at 180-81 (App. 100a). Noting that Dr. Bennun's qualifications were in dispute and that it appeared as though "the district court reassessed every decision made by Rutgers regarding Professor Bennun's qualifications and concluded that the court's assessment of the factors under review was superior to the university's," Chief Judge Sloviter concluded that it appeared that the panel had "abandoned the doctrine of restraint set forth in *Kunda*." *Id.* at 181 (App. 101a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals sanctions the substitution of subjective judicial judgments concerning academic qualifications for the subjective judgments of a university's evaluators. Thus, it abandons the principle of judicial restraint concerning academic judgments recently acknowledged by this Court in *University of Pennsylvania v. EEOC*, *supra*, 493 U.S. at 198-99, and observed by lower federal courts since the indirect-proof paradigm formulated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), was first introduced into the academic tenure and promotion context. Further, contrary to this Court's admonition in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981), the Court of Appeals' decision permits a finding of discrimination based solely upon the court's disagreement with a university-employer's subjective

assessment of a plaintiff's academic qualifications. This marks an ominous, extra-statutory application of Title VII because it expands the realm of intentional discrimination to include honestly-held subjective judgments. For these reasons, review by this Court is appropriate.

Beginning with *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), and through *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 181 (1991), the lower federal courts have tailored application of the *McDonnell-Douglas* proof structure in recognition of the academic setting of the employment decision. Their efforts have been to perfect judicial understanding of the "delicate equilibrium," *Villanueva, supra*, 930 F.2d at 129, between the "remaining freedom of choice" of universities under Title VII,³ *University of Pennsylvania v. EEOC, supra*, 493 U.S. at 198-99, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion), and the duty Congress committed to the federal courts of eliminating workplace discrimination, within educational settings as well as without.

Although most Circuits have contributed to the evolution of this "delicate equilibrium,"⁴ the First, Second and Third

3. Among these freedoms is the right to use subjective academic criteria to "determine for itself on academic grounds who may teach," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring opinion, Frankfurter, J.).

4. Although the other Circuits vary in their formulations of the principle of judicial restraint to be applied in academic tenure and promotion cases and in the reasons articulated to justify such restraint, there is a broad consensus among the Circuits that courts should not engage in a "judicial recalculation of the University's evaluation of a professor's scholarship merit." *Kyriakopoulos v. George Washington University*, 866 F.2d 438, 447 (D.C. Cir. 1989). See *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 976 (8th Cir. 1991); *Villanueva v. Wellesley College, supra*, at 129; *Anderson v. University* (Cont'd)

Circuits have played the principal leadership roles since the outset. Thus, in *Faro v. New York University*, *supra*, the plaintiff contended that the District Court had erred by refusing to test the subjective judgments of her faculty colleagues for the presence of unlawful discrimination through a comparison of her academic credentials with those of other faculty members. 502 F.2d at 1232. In rejecting Faro's contention, the Second Circuit stated:

Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.

502 F.2d at 1231-32. The *Faro* court added that if it did perform Faro's proffered analysis, it would "remove any subjective judgments by her faculty colleagues in the decision process," and that neither the court, nor even a sophisticated computer, is qualified to "digest" the qualifications and educational experience of an entire faculty, along with the specifications of a position in question, and generate a hiring or promotion decision. *Ibid*.

The First Circuit's decision in *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978), *rev'd on other grounds*, 439 U.S. 24 (1978), furthered the evolution of

(Cont'd)

of Wisconsin, 841 F.2d 737, 741-42 (7th Cir. 1988); *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1242-43 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); *Ford v. Nicks*, 741 F.2d 858, 864 (6th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); *Zahorik v. Cornell University*, 729 F.2d 85, 93-94 (2d Cir. 1984); *Lieberman v. Gant*, *supra*, 630 F.2d 60, 67-68 (2d Cir. 1980); *Kunda v. Muhlenberg College*, *supra*, 621 F.2d at 547-48; *Clark v. Whiting*, 607 F.2d 634, 639-40 (4th Cir. 1979); *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976).

the "delicate equilibrium." It challenged the "theme" of the Second Circuit's *Faro* opinion as an overbroad "notion that courts should keep 'hands off' the salary, promotion and hiring decisions of colleges and universities." *Id.* at 176 and n.13. However, it also recognized that a professor's value is a function of several intangible qualities which cannot be measured by objective standards and, that, consequently, academic tenure and promotion decisions do "require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting." *Id.* at 176 and n.14.

In *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1978), the Second Circuit responded to the *Sweeney* court's criticism of *Faro* by counselling against reliance upon *Faro* "for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices" and restating *Faro*'s holding as a common sense recognition that "courts must be ever-mindful of relative institutional competences" 580 F.2d at 1153. Following *Powell*, the Third Circuit's decision in *Kunda v. Muhlenberg College*, *supra*, distilled the wisdom of the lower courts after *Faro* into the refined principle of judicial restraint that serves to define the "delicate equilibrium" between institutional prerogatives and individual rights and, thus, to protect colleges and universities' freedom to "determine for itself who teaches on [legitimate] academic grounds," *Sweeney v. New Hampshire*, *supra*, 354 U.S. at 263.

In *Kunda*, the Third Circuit succeeded in overcoming the semantic obstacles remaining from the First and Second Circuit's abstract discussions of "judicial abdication" of responsibility, *Sweeney*, *supra*, 569 F.2d at 176, and "anti-interventionist policy," *Powell*, *supra*, 580 F.2d at 1153, by focusing concretely upon the combined impact of the nature of academic decisionmaking and of the relative institutional competencies of academic

decisionmakers and courts. Thus, recognizing that many academic employment decisions "comprehend discretionary academic determinations which do entail review of the intellectual work product of the candidate," the *Kunda* court concluded that those subjective academic decisions based upon scholarly judgments about the qualifications of the individual involved do implicate concerns about "the independence of the institution." 621 F.2d at 547-48. As to those decisions that are based upon subjective scholarly judgments about qualifications, the *Kunda* court stated:

Wherever the responsibility [to judge qualifications] lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

621 F.2d at 548. *See also Hankins v. Temple University*, 829 F.2d 437, 443 (3d Cir. 1987); *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 117 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); *Gurmankin v. Costanzo*, 626 F.2d 1115, 1125 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

Thus, the *Kunda* court recognized that a judgment reached by a reviewing court concerning the merit of subjective academic qualifications or the reasonableness of subjective scholarly

assessments of such qualifications would itself be subjective. Given that different, experienced evaluators not infrequently reach different subjective judgments about the same academic qualifications,⁵ such as the scientific merit of a research project or publication or the artistic value of a work of music — particularly where their relative competencies and experiences to judge the material vary — the *Kunda* court concluded that, in the absence of objective benchmarks, courts must refrain from reassessing the merit of subjective academic decisions.

This rule of judicial restraint is based upon the simple, common-sense recognition that, if courts were to review subjective academic judgments by measuring them against their own equally subjective — and less expert — judgments, conclusions drawn from such an analysis would represent not objective findings, but merely differences between the court's and the academic evaluators' subjective views. Consequently, for courts to reject the subjective judgments of University scholars based upon their own subjective judgments would be to posit their own subjective views as the true or correct ones — and, hence, to “substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.” 621 F.2d at 548.

The rule of judicial restraint set forth in *Kunda* reflects not only the conclusion of the lower federal courts about the propriety of judicial second-guessing of subjective academic decisionmaking, but also the pronouncements of this Court concerning judicial review of subjective academic and nonacademic decisionmaking. Thus, this Court has cautioned:

5. See *Zahorik v. Cornell University*, *supra*, 729 F.2d at 93 (“Where a broad spectrum of views is sought and the candidate suggests certain persons as referents, a file composed of irreconcilable evaluations is not unusual.”).

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. [Footnote omitted.]

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985), citing *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (concurring opinion, Powell, J.). Although these cases address faculty assessments of students' academic performance, such judicial deference is equally appropriate when academic evaluation is directed toward faculty. See *University of Pennsylvania v. EEOC*, *supra*, 493 U.S. at 198-99; see also *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (concurring opinion, Powell, J.).

Similarly, this Court has deferred to expert decisionmakers in various contexts when it has concluded that courts are ill-equipped to second-guess their discretionary judgments. See *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (affording "considerable deference" to prison administrators' expert decisions on prison management issues implicating inmates' constitutional rights because the judiciary is ill-equipped to review delicate balance of institutional management and individual liberty interests); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (*same*); *Youngberg v. Romeo*, 457 U.S. 307, 321-323 (1982) (affording deference to mental institution's professional judgments concerning conditions of residents' confinement because professionals are better qualified than courts to balance institutional management and individual liberty interests); *Parham v. J.R.*, 442 U.S. 584, 607-08 (1979) (the decision whether to commit an individual to a state mental health facility is a medical

decision that must be left to the physician's judgment); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (to the same effect as *Thornburgh v. Abbott*, *supra*). See generally *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 999 (1988) (plurality opinion).

The fallacy of the District Court's conclusion that its analysis avoided substitution of its judgment for that of the University's evaluators by isolating and analyzing "objective" facts, 737 F. Supp. at 1405 (App. 82a-83a), is demonstrated by examination of its findings. For example, the District Court found, and the Court of Appeals affirmed, that the 1978-79 college-wide Committee had applied a different and harsher standard in evaluating Dr. Bennun's research qualifications than it had in evaluating those of Dr. Somberg.⁶ *Id.* at 1405 (App. 82a-83a); 941 F.2d at 179 (App. 56a). The District Court reached this finding by comparing statements appearing in their respective written evaluations. The Committee's written statement in 1978 about Dr. Bennun's research included the following:

Although he has made numerous contributions to conferences and symposia, Dr. Bennun has published his work in refereed, full-length papers only at a modest rate. (App. 102a).⁷

6. This "disparate treatment" by the four members of the 1978-79 Committee took place in 1978. The Committee which evaluated Dr. Bennun in 1980-81 was comprised of four different faculty members. Thus, even if disparate, the treatment of Dr. Bennun by the 1978-79 Committee cannot be said, factually or legally, to have played any role in the 1981 denial of promotion. Despite this, the District Court found that it showed Dr. Bennun's 1981 promotion denial to have been discriminatory, 737 F. Supp. at 1408-09 (App. 82a-83a), and the Court of Appeals concurred in affirming the judgment. 941 F.2d at 179 (App. 56a).

7. The District Court quoted limited phrases from the Committee statements. The exhibits which contain the complete statements are reproduced at App. 102a-107a.

The Committee's written statement in 1978 about Dr. Somberg included the following:

Dr. Somberg's scholarly work both in terms of the extent of present and continuing activities and of the quality evident in the published work appears excellent. (App. 106a).

The District Court construed both of these statements as setting forth the Committee's opinions of Dr. Bennun's and Dr. Somberg's "quantity of publication." 737 F. Supp. at 1405 (App. 82a-83a). Reasoning that "quantity" of publication is an objective measure, the District Court determined that, on this "objective" question, the Committee had judged Dr. Bennun "modest" and Dr. Somberg "excellent." The District Court then counted all the publications listed in Dr. Bennun's and Dr. Somberg's promotion packets and determined that his listing showed more publications than did Dr. Somberg's. Based on this indisputably objective count of publications, the District Court declared that it had determined objectively that the Committee had applied a harsher standard in assessing Dr. Bennun's quantity of publication than it had to Dr. Somberg's because it had labeled his publication output "modest" and Dr. Somberg's "excellent." 737 F. Supp. at 1409 (App. 91a).

Plainly, the District Court did substitute its judgment for that of the Committee by ignoring the words that it actually used and interjecting, in their place, the District Court's own construction of the subjective judgment that the Committee intended those words to express. Although it cannot be determined with certainty which of Dr. Somberg's academic credentials the Committee referred to in the above-quoted statement (App. 106a), even a lay reading of that statement shows that it nowhere states or implies that Dr. Somberg's "rate of publication" was excellent. Thus, the District Court did not succeed in erecting an objective

test of subjective judgments; it merely succeeded in persuading itself that it had done so.⁸

The District Court also reviewed several other aspects of the evaluations of Drs. Bennun and Somberg and disagreed with the judgments of their respective evaluators. For example, concerning teaching effectiveness, the District Court expressly rejected the near-unanimous judgments of Dr. Bennun's evaluators in 1980-81 and Dr. Somberg's evaluators in 1978-79 — based upon the evaluators' subjective assessments of the data relating to teaching qualifications — that Dr. Bennun's teaching effectiveness was, at best, "average" and that Dr. Somberg's was "outstanding." In doing so, the District Court reviewed the raw material in the respective files and concluded that Dr. Bennun's and Dr. Somberg's teaching qualifications were indistinguishable. *Id.* at 1406-07 (App. 86a-87a); *see also* 941 F.2d at 177-79 (App. 51a-56a). In making the determination to reject the University evaluators' assessments of Dr. Bennun's and Dr. Somberg's respective teaching qualifications simply because its *de novo*, subjective assessment of those qualifications differed, the District Court plainly substituted its judgment for that of the University's evaluators.

In the pretext stage of the *McDonnell-Douglas/Burdine* analysis, the substitution of a court's subjective judgments for the academic judgments of University evaluators on the merits of a plaintiff's intellectual work product perverts the analysis by *creating* otherwise non-existent evidence of pretext. That is, where, as here, a court forms subjective judgments about the merits of a plaintiff's qualifications and then proceeds to find that the differences between its subjective judgments and those of

8. The District Court repeated this analysis in comparing several other aspects of the credentials of Dr. Bennun and several other faculty members and reached similarly inappropriate findings of disparate treatment. *Id.* at 1405-09 (App. 82a-92a).

University evaluators constitute evidence of pretext, the court's subjective judgments themselves inappropriately become the evidence upon which pretext and the ultimate finding of intentional discrimination is based.

This Court has recognized that Title VII prohibits only employment decisions that are motivated by proscribed forms of discrimination and protects an employer's "remaining freedom of choice" to use any non-proscribed criteria for making employment decisions. *University of Pennsylvania v. EEOC*, 493 U.S. at 198-99. As this Court's decision in *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 259, makes plain, that remaining employer freedom includes the right to make employment decisions based upon judgments with which courts may not agree. This Court recognized in *Burdine* that the fact that a court may think that the employer misjudged qualifications may be probative of pretext. However, such a fact, in and of itself, cannot be the basis for a finding of discrimination. *Ibid*; see also *Molthan v. Temple University*, 778 F.2d 955, 962 (3d Cir. 1985) (holding that a record showing solely differences of opinion among evaluators as to the merit of the plaintiff's qualifications is insufficient as a matter of law to establish pretext).

Accordingly, in examining the credibility of a university's assertion that it denied a faculty member promotion because it judged his or her qualifications to be unworthy, this Court's decision in *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 259, dictates that the ultimate inquiry is not whether the university's subjective judgment corresponded to the court's subjective judgment of the faculty member's qualifications, but whether the university's judgment was honestly held. *Lieberman v. Gant*, *supra*, 630 F.2d at 66-67. Because, as shown, the District Court here substituted its subjective judgment for that of the University's evaluators as to the merit of Dr. Bennun's qualifications, its resulting finding of intentional discrimination

represents nothing more than its subjective disagreement with the University's academic judgment. Since academic tenure and promotion decisions typically "are a source of unusually great disagreement," *Zahorik v. Cornell University, supra*, 729 F.2d at 93 — as is the case here — the fact that the District Court reached a particular subjective judgment of Dr. Bennun's qualifications, while a consensus of University evaluators reached another, is insufficient to establish pretext where the record is devoid of any "evidence" of discrimination apart from the District Court's subjective judgment.

The decisions here have skewed the "delicate equilibrium" between an employer's freedom of choice and the obligation of the federal courts to enforce Title VII. The decisions will cause great damage to the body of law governing the application of Title VII to subjective decisionmaking, particularly in the academic setting. Furthermore, the decisions below are particularly worthy of this Court's attention because, if applied by other federal courts, they will alter radically pretext determinations under the *McDonnell-Douglas* paradigm in the academic tenure and promotion context and in all other settings where subjective criteria are used to make employment decisions.

If the decisions are allowed to stand, ultimately they may lead to the end of the peer review system as presently constituted. In order to insulate themselves from the kind of discrimination finding made here, institutions could no longer rely prudently on independent, subjective evaluations of each candidate, but, rather, would be forced to require evaluators to compare a candidate's qualifications to those of candidates promoted in past years. In that event, the decision to recommend promotion (or tenure) would be based, not upon the individual academic judgments of the evaluators as to whether promotion was deserved, but upon the evaluators' judgments as to whether the candidate's qualifications were equal to or better than those of the least

qualified person previously promoted. The decisions below will haunt colleges and universities whose faculties and students this Court has recognized have been well served for generations by the very decentralized peer review system at risk in this case. See *Watson v. Ft. Worth Bank & Trust*, *supra*, at 999 (plurality opinion) and at 1007 (concurring opinion, Blackman, J.).

For these reasons, this Court should grant this petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

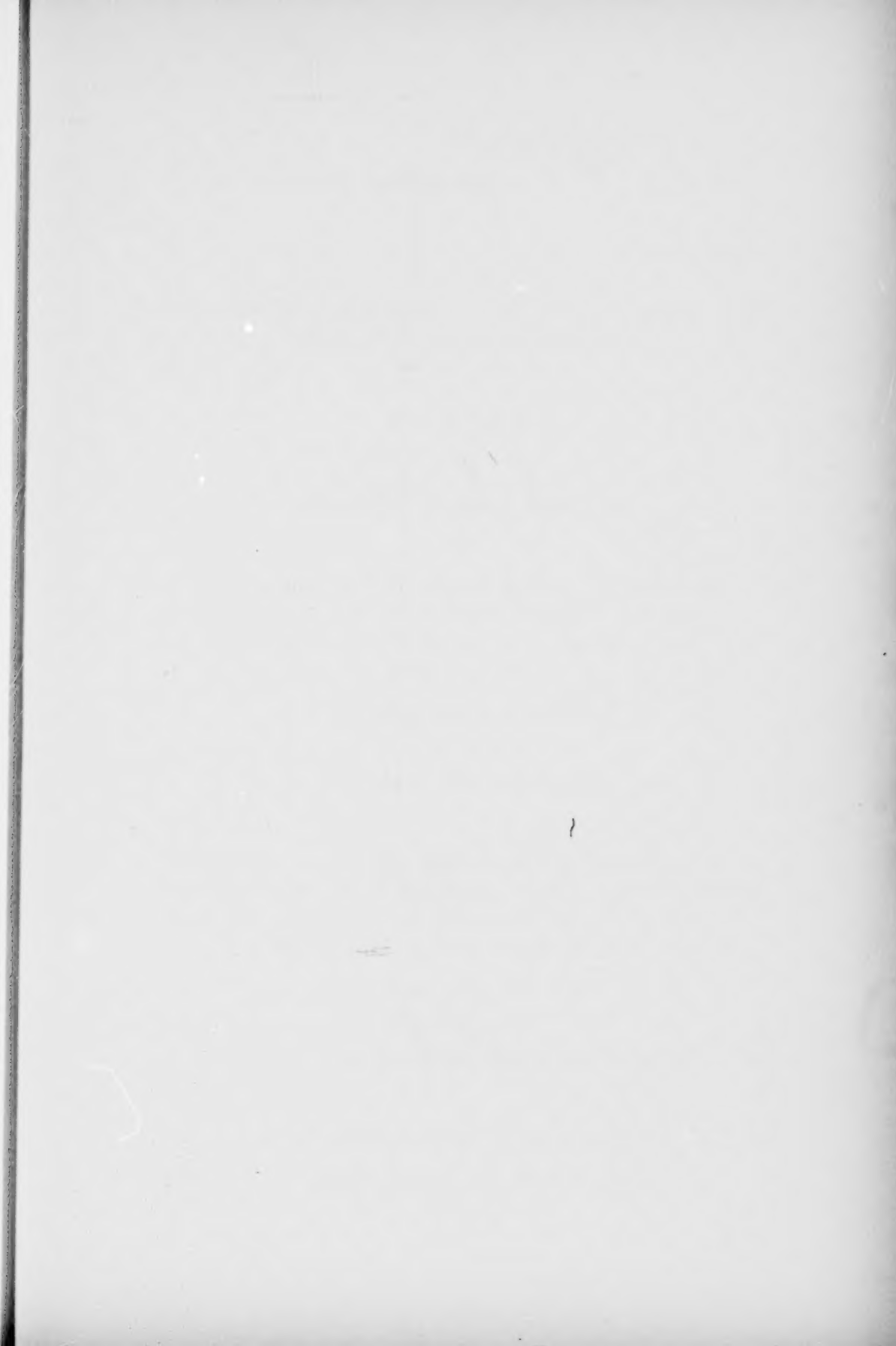
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November 18, 1991





APPENDIX A

Filed July 25, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5638

DOCTOR ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS STATE UNIVERSITY;
and DOCTOR EDWARD J. BLOUSTEIN,
PRESIDENT

(Civil Rights No. 84-4655)

DR. ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS STATE UNIVERSITY;
and DR. EDWARD J. BLOUSTEIN, PRESIDENT,
RUTGERS STATE UNIVERSITY

(Civil Rights No. 85-3491)

DR. ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY

(Civil Rights No. 86-621)

RUTGERS, THE STATE UNIVERSITY; BOARD
OF GOVERNORS OF RUTGERS, THE STATE
UNIVERSITY; and DR. EDWARD J.
BLOUSTEIN,

Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 84-04655)

Argued: January 23, 1991

PRESENT: BECKER and HUTCHINSON,
Circuit Judges, and
SMITH, *District Judge**

(Opinion Filed July 25, 1991)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

Rutgers, The State University of New Jersey (Rutgers) appeals from a judgment of the United States District Court for the District of New Jersey granting appellee, Dr. Alfred Bennun (Bennun) promotion to Full Professor with full back pay retroactive to the end of the University's 1980-1981 promotion review period. The back pay amounted to the difference between Bennun's earnings as a tenured associate professor and what he should have been paid as a full professor, a position the district court held Rutgers had wrongly denied him. The judgment was fashioned to give Bennun full relief from Rutgers' violations of his right to be free of unlawful discrimination under 42 U.S.C.A. § 1981 (West 1981) and his right to equal opportunity in employment under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981). We will affirm in part. In doing so we hold that

Rutgers' treatment of Bennun in the promotion review process did not violate § 1981 and will thus reverse that portion of the district court's judgment; but, as we agree with that part of the district court's order imposing liability because Rutgers' actions violated Title VII, we will affirm that part of its decision. Moreover, because all of the relief the district court granted Bennun was available to cure the Title VII violation, our partial reversal of the district court on Bennun's § 1981 claim for unlawful discrimination does not affect the remedy that the district court provided. Accordingly, we will affirm its remedial order.

I.

Bennun filed a charge of discrimination with the Equal Employment Opportunity Commission (the Commission) in 1981. He charged that Rutgers' denial of his bid for full professorship during the 1980-81 review period was not only discriminatory, but also in retaliation for his earlier filing of discrimination charges against Rutgers when it denied him promotion to associate professor with academic tenure. The Commission's investigation of Bennun's instant charge lasted over three years and resulted in a Commission determination that there was reasonable cause to believe that Rutgers violated Title VII when it failed to grant Bennun the rank of full professor. The EEOC's right to sue letter authorized Bennun to sue in his own right, but the Commission itself decided not to sue Rutgers.

In the meantime Bennun had also filed a grievance against Rutgers' refusal to afford him the rank of full professor, as permitted by the collective bargaining agreement between Rutgers

and the American Association of University Professors. In 1982 a university review panel found the 1981 decision denying Bennun tenure was arbitrary and capricious. The review panel recommended that an outside arbitrator hear the matter. Rutgers did not implement this recommendation.

Rutgers' failure to implement the review panel's recommendation led Bennun to file suit in the Superior Court of New Jersey, Chancery Division, in 1984. In that suit Bennun sought to compel Rutgers to appoint an outside neutral party to hear and decide his grievance. The Chancery Division did not grant Bennun the relief he requested, but instead remanded the matter to the university with a direction that Rutgers undertake a further evaluation of Bennun's claim. Rutgers reevaluated Bennun in March of 1985 and persisted in denying him the status of a full professor.

In November of 1984, without awaiting the results of the reevaluation the state court had ordered, Bennun started this action in the United States District Court for the District of New Jersey pursuant to the Commission's right to sue letter. In it he alleged Rutgers violated Title VII, specifically 42 U.S.C.A. §§ 2000e-2(A)(1), 2000e-3(A) and 42 U.S.C.A. § 1981 when it denied him the rank of full professor in 1980-81. In August 1985 Bennun filed a second federal action with allegations similar to those in his 1984 federal complaint. The 1985 federal action arose out of Rutgers' 1982-83 refusal to grant him a full professorship. An identical refusal in the 1984-85 review period led Bennun to initiate still a third federal action in February of 1986. This 1984-85

refusal was occasioned by the reevaluation ordered by the Superior Court of New Jersey's Chancery Division. Bennun's second and third federal actions were, like his first, preceded by a Commission-issued right to sue letter.

All three federal actions were consolidated by the district court. Rutgers moved for partial summary judgment claiming, among other things, that Bennun had no standing to maintain his § 1981 claims because he was not Hispanic and that Bennun's 1984 state-court action precluded his claims based on the 1980-81 and 1982 promotion denials because of New Jersey's entire controversy doctrine. The district court denied Rutgers' motion on these points, although it did grant other relief on points not material to this appeal.

After a bench trial, the district court held that Bennun's denial of promotion to full professor was actionable under § 1981. *See Bennun v. Rutgers, The State University*, 737 F. Supp., 1393, 1397-98 (D.N.J. 1990). It then denied Bennun's retaliation claim under § 1981 and Title VII, but found that Bennun had proven his disparate treatment claims under both statutes. *Id.* at 1400-01, 1408-09. In its disparate treatment analysis, the district court compared Bennun's review packets with those of Dr. Ethyl Somberg, a professor in the same department as Bennun. Somberg had been promoted from Associate Professor to Full Professor in 1979. *Id.* at 1404-1409. Relying in part on its comparison of Somberg's academic credentials with Bennun's, the district court held that Bennun had made out a *prima facie* case of disparate treatment and that Rutgers' proffered nondiscriminatory reason, failure to meet the university's high standards for full professorship

in the judgment of his peers, was a pretext for discriminatory denial of the promotion Bennun requested. In support of its decision the district court, comparing Bennun's promotion treatment with that of other tenured associate professors, in particular, with that of Somberg, found the following facts:

1. A different standard was applied to Bennun in terms of number of publications. (Bennun with more publications was [found] moderately active while Somberg[, with less,] was [found] excellent in quantity.)

2. A different standard was applied to Bennun concerning what level of achievement was necessary to be promoted. (Bennun was required to become an international leader while other promoted candidates, whose letters indicated they were not international leaders, were promoted.)

3. A different standard was applied concerning grant support. (For Bennun this was a negative factor, for Somberg it was not relevant.)

4. A different standard was applied concerning the level of specificity required by peer reviewers. (Bennun's [letters] were not specific while other candidates had none.)

5. A different standard was applied concerning the age of the peer review letters. (Bennun's were old and therefore negative. Somberg's, although just as old were not considered dispositive.)

6. A different standard was applied concerning the number of peer review letters. (The University inferred a lack of interest in Bennun but not in others who did not have the continued support evidenced in Bennun's packet.)

7. The [Appointments & Promotions] committee *sua sponte* concluded, without any evidence, that a damning letter was being withheld from Bennun's packet. No such inference was drawn with reference to other candidates with similar or less substantial peer review packets.

8. Somberg's research was considered in light of her teaching. Bennun who taught a similar load was not so evaluated.

9. The University's explanation that Bennun's research was inadequate is not worthy of credence in light of a comparative analysis with other promoted candidates whose research qualifications were judged excellent.

Id. at 1409. The court ordered that Bennun be granted the rank of full professor retroactive to July, 1981, with full back pay and benefits. *Id.* This timely appeal by Rutgers followed.

II.

A.

Promotion and tenure decisions at Rutgers are made on the basis of five criteria as set out in University Regulation 3.30. These five criteria are: teaching effectiveness; scholarly/creative activity; research accomplishments; professional activity/public service; and general usefulness. In Regulation 3.30 Rutgers also sets forth a standard for application of the criteria when tenured associate professors are under consideration for award of a full professorship:

A full professorship is the highest academic rank. An individual promoted to this rank should have met with distinction one or more of the criteria indicated previously, and have made

substantial progress beyond that for which he or she was recognized at the associate professor level.

Joint Appendix (Jt. App.) at 1443.

The process of evaluating candidates for a full professorship begins when the candidate submits to his department chair a curriculum vitae, a list of potential outside evaluators and any other documents or materials the candidate wants to have considered. The persons who will serve as outside evaluators are selected by the candidate's department. The candidate's packet includes these materials, plus any materials added to the candidate's packet as his candidacy goes through successive levels of review and evaluation forms are completed upon review at each successive level.

The candidate is first evaluated by those persons in his department who are at or above the level for which he is being considered. In this case, Bennun's departmental evaluators were all the full professors in his department. Based on these departmental evaluations, the candidate's department chairperson passes a departmental recommendation to the Dean of the academic unit that encompasses that department. An academic unit is made up of a group of related departments.

The candidate is then evaluated by his unit's Appointments and Promotions Committee, an advisory committee to the Dean. This committee has four members. Two are selected by the Dean and two by the faculty.¹ The Appointments and

1. After 1983, an independent evaluation of the candidate was done by his department head after the departmental review, but before the Appointments and Promotions Committee's review.

Promotions Committee independently evaluates the candidate's packet.

After the committee's independent review, the candidate's Dean evaluates the packet. At the same time that the Dean is evaluating the candidate, the section, a University-wide² group of all faculty members in the candidate's discipline at or above the level for which the candidate is being considered, evaluates the candidate's research and scholarly activity. The packet the section receives does not contain the recommendations of either the Dean or the Appointments and Promotions Committee.

After section evaluation, the university's Promotion and Review Committee, consisting of the University Executive Vice-President and Chief Academic Officer, the Camden, New Brunswick and Newark provosts and four senior faculty who are appointed by the President, reviews the candidate's packet which now includes the recommendations of the Dean and the section. This committee reports to the President if and only if its recommendation about the candidate is positive. The President then makes his own independent evaluation of the candidate's packet and at last submits a recommendation to the Board of Governors. The Board of Governors makes the final decision based on all of the candidate's packet including the President's recommendation.

2. Rutgers has three campuses located in Camden, New Brunswick and Newark respectively. See 1990 Information Please Almanac 864. Thus, while all of the evaluations up to this point would have been conducted by the respective evaluators on Bennun's Newark campus, the section evaluation would involve professors in his discipline from Camden, New Brunswick and Newark.

B.

Bennun was born in Argentina and earned his bachelor's, master's and doctoral degrees from the University of Cordoba in that country. He joined the Department of Zoology and Physiology on Rutgers' Newark campus in 1969 as an untenured Associate Professor of Biochemistry. He became a tenured Associate Professor in 1972. Bennun's road to tenure was not smooth. Though he was unanimously backed for tenure in 1970 by his department he was ultimately denied tenure and given only a one-year terminal contract under the usual academic policy of up or out. Bennun secured tenure only after pursuing his legal remedies in court.

During the academic year 1978-79 Bennun applied for the position of Full Professor. He was turned down. His department had voted in favor of granting him full professorship by a plurality of three votes to two with one abstention. The Dean concurred in the department's recommendation. However, both the Appointments and Promotions Committee and the section voted against Bennun's promotion. The Appointments and Promotions Committee voted against Bennun zero to four. The section vote was two to six against Bennun with an abstention.

In 1980-81, Bennun again sought full professorship. His curriculum vitae then listed twenty-two published articles, including one being readied for publication, twenty-six abstracts, thirty-nine invited lectures, twenty-six paper presentations at professional meetings, sixteen different courses that he had taught at various times at Rutgers, and twenty-nine grants that he had received. Since his 1978-79 review, Bennun

had readied one article for publication, given four invited lectures, made one paper presentation at a professional meeting and received two more grants.

The outside evaluations in Bennun's packet included four which had also been included in the 1978-79 packet. Three of these four evaluators were suggested by Bennun and one was solicited by Rutgers. Alfred Lehninger, the evaluator selected by Rutgers, said, while Bennun's work was not directly in his field, he was intrigued by it, thought it original and well supported. Because Lehninger was not directly involved in Bennun's specific academic field he referred Rutgers to Ephraim Racker (Racker). Racker had already been suggested by Bennun as an evaluator. He was described by Dr. James Hall, Chair of the Department of Zoology and Physiology at Rutgers Newark Campus from 1962 to 1969, as "one of the, maybe 6 to 12 best, most widely known biochemists in the country." Jt. App. at 83.

Racker wholeheartedly supported Bennun for promotion. He wrote that "recent work on the effect of non-adrenaline on brain adenylate cyclase represents a significant contribution to this important field." Similarly, Sabatini, Chair of the Department of Cell Biology at NYU Medical Center, stated that Bennun was "well deserving promotion" based upon his "original scientific work" Finally, de la LLOSA noted that Bennun's research work on adenylate cyclase was "remarkable."

Bennun, 737 F. Supp. at 1402.

This time Bennun's department supported his application by a vote of five to zero with one abstention. The department rated Bennun

outstanding in scholarly/creative activity and research accomplishments, above average in professional activity, above average to average in general usefulness and average in teaching effectiveness. The Dean concurred in the department's recommendation. He rated Bennun's performance as outstanding in scholarly/creative activity, outstanding to above average in research accomplishments, above average in professional activity and average in teaching effectiveness and general usefulness.

The remaining committees remained opposed to Bennun's candidacy. The Appointments and Promotions Committee voted unanimously against promotion, zero to four, ranking Bennun above average in professional activity but average in all other categories. It stated that Bennun's lack of outside grant funding since coming to Rutgers was puzzling and that his research accomplishments were tainted by his lack of experimental follow-up to prove his theoretical papers, the "apparent unwillingness of outside evaluators to commit themselves to detailed and informative judgment," Jt. App. at 1253, and a drop off in his publication rate since coming to Rutgers. The section voted against full professorship. Two members favored Bennun's promotion and four opposed his candidacy. The section concluded that although some of his research work was "substantial" its total was "insufficient to support promotion." Jt. App. at 1256. The Promotion Review Committee said "[t]he record indicates that he hasn't established a scholarly and [sic] research production to reach the level required for the rank of Professor." Jt. App. at 1257. The Promotion Review Committee rated Bennun as active

professionally and useful to the graduate program, but only slightly above average in teaching effectiveness. The Board of Governors officially denied Bennun's request on May 15, 1981.

In 1982, undeterred, Bennun again sought the rank of full professor. In the two terms since he had last been considered Bennun had taught five different courses and overseen two research classes. Other additions to his file included publication of an article he had been readying for publication during his last review, another published abstract, two invited lectures, and another paper presented at a professional meeting.

The department recommended that Bennun be awarded a full professorship on a vote of four to zero with three abstentions. The department rated his scholarly/creative activity and research accomplishments as outstanding, his professional activity above average, his general usefulness slightly above average and his teaching effectiveness average. Again, the Dean concurred in the department's recommendation. He rated Bennun's scholarly/creative activity as outstanding to above average, his research accomplishments and professional activity as above average and his teaching effectiveness and general usefulness as average.

All four members of the Appointments and Promotions Committee voted against Bennun's candidacy. The Committee rated him above average in professional activity but average in all other categories just as it had during Bennun's previous review. The Committee criticized Bennun's lack of outside grant support and his diminishing research production. The Appointments and Promotions Committee described his outside

evaluations as mixed and criticized Bennun because "his experiments, though carefully done, have not made an impact in his fields." Jt .App. at 1330.

Only three of the eighteen eligible section members voted. Two of the three voted against Bennun. One voted for him. The section said Bennun's publication record was unsatisfactory for a person seeking the rank of full professor. Thereafter, the Promotion and Review Committee failed to recommend Bennun be granted the status of full professor. Eventually the Board of Governors again denied Bennun's bid for promotion.

Bennun was again denied a full professorship after a 1983-84 review. Bennun has not sued Rutgers in connection with this review. Ironically, in 1983-84, for the first time, the section recommended Bennun as a full professor seven to two; but Bennun failed to get a recommendation to that effect from either his Dean or department chair.³ The department unanimously recommended Bennun but the Appointments and Promotions Committee narrowly voted not to recommend him with one member voting for him, two members against and one abstaining. The Promotion and Review Committee again did not recommend Bennun, and the Board of Governors reached the same decision.

In 1984-85, as stated, a reevaluation of Bennun's 1980-81 bid for promotion was undertaken as a result of Bennun's 1984 sojourn in state court. The first levels in the evaluation process relied on the 1982 department and section

3. This was the first review in which the department chair had a separate vote. See *supra* note 1.

evaluations. Thus, the department again recommended Bennun for full professor, but the section did not. In a new evaluation, the Dean did not recommend Bennun: rating him above average in professional activity, above average to average for scholarly/creative activity, average in research accomplishments and general usefulness and average to below average in teaching effectiveness. The Dean expressed concern about Bennun's research, remarking that it "is not characterized by great originality or much impact on the profession," and what he said was Bennun's unremarkable publication output. Jt. App. at 1388. The Appointments and Promotions Committee did not recommend Bennun after rating him outstanding in professional activity, slightly above average in scholarly/creative activity, average in research accomplishments and general usefulness and average to below average in teaching effectiveness.

The Promotion and Review Committee also did not recommend promotion. It criticized Bennun primarily on his post-tenure research and said it did "not sufficiently reflect the recognition for original contributions to the discipline and leadership in its development which is necessary to justify this promotion." Jt. App. at 1375. The Board of Governors also denied Bennun's application.

III.

The district court had subject matter jurisdiction over Bennun's Title VII and § 1981 claims through its power to hear federal questions, *see* 28 U.S.C.A. § 1331 (West Supp. 1991), and its power to hear civil rights cases, *see* 28 U.S.C.A.

§ 1343(a)(3), (4) (West Supp. 1991). We have jurisdiction over the final order of the district court under 28 U.S.C.A. § 1291 (West Supp. 1991). Our scope of review varies with the individual issues the parties present. We will therefore separately set forth the scope of review at the outset of our analysis of each issue.

IV.

We begin with Rutgers' contention that Bennun's federal actions are precluded by New Jersey's entire controversy doctrine. Our review of the district court's conclusion that Bennun's present action was not barred by New Jersey's entire controversy doctrine is plenary. See *Doertinkel v. Hillsborough*, 835 F.2d 1052, 1054 n.4 (3d Cir. 1987). The New Jersey entire controversy doctrine is a particularly strict application of the rule against splitting a cause of action. Like all versions of that rule its purpose is to increase judicial efficiency. Thus it precludes not only claims which were actually brought in previous litigation, but also claims that could have been litigated in the previous litigation. *Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 930 (3d Cir. 1991). Under settled federal case law we must give the 1984 New Jersey state-court judgment the same preclusive effect that New Jersey would give that judgment.⁴ See *id.* at 929-930 (quoting *Migra v.*

4. The Commission argues that the entire controversy doctrine cannot apply when it would frustrate congressional intent, in this case the administrative attempts to resolve Title VII charges. See typescript, *supra* at 22-23 (setting forth the Commission's argument in full). Because we resolve this issue on other grounds, we leave open the question whether a supervening federal interest might obviate application of the entire controversy doctrine.

Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)). Accordingly, we have held that New Jersey's entire controversy doctrine applies to bar claims in a federal-court when there was previous state-court action involving the same transaction. See, e.g., *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 590-594 (3d Cir. 1989).

The district court rejected Rutgers' claim that Bennun's 1984 state-court action barred him from bringing the claims in this present case. It held the entire controversy doctrine did not foreclose any of Bennun's federal actions because "the 1984 state action sought relief relating solely to the employment agreement and not as to protection of [Bennun's] Constitutional and Civil rights." *Jt. App.* at 2267. Although we concur in the conclusion, we rely on a different rationale.

The crux of the entire controversy issue, according to Rutgers, is whether the events giving rise to Bennun's Title VII and § 1981 actions based on the university's 1980-81 and 1982 denials of full professorship arise out of the same single occurrence or transaction, or a related series of transactions or occurrences that gave rise to Bennun's 1984 state-court suit in the Chancery Division. Rutgers concedes that even if we reverse the district court on this point, Bennun's claims relating to the 1984-85 evaluation remain. See Reply Brief of Appellant at 14 n.8. It makes this concession because the events that led to Bennun's 1984-85 denial of status as a full professor did not happen until after his state-court suit had ended. Thus, a reversal of the district court's holding on the entire controversy doctrine will not fully dispose of this case.

Bennun argues that application of the entire controversy doctrine is moot because even if it

does apply, it would not bar his action concerning the 1984-85 denial. He reasons that the district court finding that he was qualified for promotion in 1980-81, determined, *a fortiori*, that he was qualified in 1984-85 when the remanded evaluation of the 1980-81 promotion denial occurred. Bennun further notes that Rutgers had committed itself to promote him retroactively to 1981 if the 1984-85 reevaluation resulted in a decision in Bennun's favor. *Jt. App.* at 1377. Accordingly, he says the district court could not have acted contrary to the entire controversy doctrine when it held he was entitled to an order directing Rutgers to grant him, retroactive to 1981, the status of full professor on its finding that the 1984-85 denial was unlawfully discriminatory.

"The Supreme Court [of the United States] frequently has explained that the mootness doctrine is derived from Article III's prohibition against federal courts issuing advisory opinions." *See E. Chemerinsky, Federal Jurisdiction* § 2.5.1, at 110 (1989). As a result, the doctrine has a jurisdictional tenor of constitutional dimensions. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). If the specific facts or circumstances of this case renders Rutgers' entire controversy argument moot we cannot decide the entire controversy issue. We therefore address first Bennun's argument that the entire controversy issue is moot.

The district court found that Bennun was qualified for promotion to Full Professor at the time of the 1980-81 review and that he was discriminatorily denied the promotion. *See Bennun*, 737 F. Supp. at 1408-09. Bennun's argument that this finding means that he was *a fortiori* qualified

for promotion in 1984-85 has some appeal. Because Rutgers had agreed to promote Bennun retroactively to 1981 if the 1984-85 evaluation was resolved in Bennun's favor, the remedy that Bennun would receive by winning his action based on the 1984-85 promotion denial would be the same as he would receive if he won his action based on the 1980-81 promotion denial. Thus, Rutgers' concession that the entire controversy doctrine does not preclude the claim based on the 1984-85 promotion denial at first appears to moot the issue. A closer examination though, casts doubt on this conclusion.

Assuming, without deciding, that the district court's determination that Bennun was qualified for promotion in 1980-81 necessarily implies that he was also qualified in 1984-85, the entire controversy doctrine would still be relevant to this case if we were to decide that the district court erred when it "implicitly" found Bennun was qualified for promotion in 1984-85 or that it erred when it found Bennun was discriminated against in the 1984-85 review. Based on the record relating to the 1984-85 denial, we might possibly decide that the district court's ruling on it could not withstand scrutiny. If so, in order to fully evaluate Bennun's claims, we would then have to see whether the record on the 1980-81 or 1982 denials supports the district court's finding; but the 1980-81 and 1982 denials are the very ones that Rutgers' claims we cannot examine under the entire controversy doctrine. Thus, the entire controversy doctrine may still determine the viability of Bennun's claims and therefore its application to our decision on the earlier appeal is not moot.

On the merits of the entire controversy doctrine, Rutgers contends that the district court mistakenly focused on the different nature of the state and federal claims in failing to dismiss those arising out of the 1980-81 and 1982 denials. The claim regarding the 1980-81 denial was the subject of the grievance that led to the 1984 state-court action. In his state-court complaint Bennun alleged that he was "considered for promotion to the rank of full Professor and has continuously been denied said promotion" over the course of many years. Jt. App. at 2151. Because the 1982 decision was part of Bennun's string of promotion denials and was known to him before he filed the 1984 state-court action, Rutgers' claims that the 1982 claim is also barred. At bottom, Rutgers argues that the entire controversy between Bennun and Rutgers is its repeated refusal to promote him to Full Professor and that he could have raised all of the issues relating to the 1980-81 and 1982 actions before the state court in 1984, and that his later claims are so related to the earlier denials as to bring the doctrine into play even on them.

In contrast, Bennun argues that he was seeking to vindicate different rights in the state, as opposed to the federal actions. He says the 1984 state-court action sought to compel Rutgers to stick to the terms of the collective bargaining agreement and the present suit seeks to address claims of discrimination. The earlier suit was not a part of the extended transaction regarding the merits of Bennun's promotion claims. Rather, he argues, the grievance it concerned made that transaction, in which he sought only to vindicate his procedural right to a full airing of his grievance, a transaction distinctly different and separate from those in which he sought relief from

unlawful discrimination, especially since relief on the merits of his discrimination claim was not available on the state action to compel arbitration.

The Commission, arguing in support of Bennun, as *amicus curiae*, takes a slightly different tack. It argues that the entire controversy doctrine applies only if further litigation would later be needed to resolve the controversy at issue. If so, whatever is not originally litigated is barred. The Commission contends that no further litigation was necessary in 1984 to decide Bennun's right to arbitration when he brought the state court action to vindicate his asserted right to an impartial outside arbitrator under the collective bargaining agreement. Additionally, the Commission notes that the state and federal claims involved different facts and requested different relief.

According to the Commission application of the entire controversy doctrine to Bennun's § 1981 and Title VII claims would ignore the fact that the merits of an underlying dispute cannot be addressed in an action to compel arbitration. The Commission says that if the entire controversy doctrine applies to this case, Bennun would have been compelled to request prematurely a right-to-sue letter from the Commission in order to litigate all of his possible claims at one time and so comply with the New Jersey's preclusive rule. Because a right-to-sue letter terminates administrative attempts to settle the dispute through conciliation, a means of resolving Title VII disputes that Congress sought to encourage, the Commission argues application of the doctrine to Bennun's case would frustrate congressional intent.

Rutgers responds that the cases the Commission refers us to on the judicial policy against resolving

the merits of a claim during an action to compel arbitration are inapposite because Bennun's "1984 state-court action simply represent[ed] a step in his efforts to redress the alleged discriminatory denials of promotion." Supplemental Reply Brief of Appellants at 7. On the supremacy claims it also argues that in this case the time period for administrative action had passed by the time Bennun had filed the 1984 action so that the Commission's argument that the doctrine interferes with the Title VII conciliation process is not material. For the reasons that follow we find it unnecessary to decide the issue the Commission raises concerning potential conflict between New Jersey's judge-made entire controversy doctrine and Congress's intent to foster conciliation in Title VII cases.

We begin with an evaluation of the leading New Jersey cases on the entire controversy doctrine and this Court's interpretation of them. In *Aetna Ins. Co. v. Gilchrist Bros., Inc.*, 428 A.2d 1254 (N.J. 1981), the Supreme Court of New Jersey stated that the entire controversy doctrine "requires that a party include in the action all related claims against an adversary and its failure to do so precludes the maintenance of a second action." *Id.* at 1257. The *Aetna* court noted that the doctrine traces its roots to *Ajamlan v. Schlanger*, 103 A.2d 9 (N.J.), *cert. denied*, 348 U.S. 835 (1954), an opinion authored by then-Supreme Court of New Jersey Justice Brennan. The *Ajamlan* court barred a plaintiff's damage claim against a defendant who had allegedly induced the plaintiff to enter into an agreement by deceit. The court held this claim was barred by an earlier action of the plaintiff for rescission of the contract. Justice Brennan wrote that the *Ajamlan* holding was necessary to achieve

judicial efficiency, a fundamental goal of New Jersey's then recent constitutional reform of its judicial system, by providing for the "expeditious determination in a single action of the ultimate merits of an entire controversy between litigants." *Ajamlan*, 103 A.2d at 10, cited in *Aetna*, 428 F.2d at 1257.

Many cases since *Ajamlan* have discussed what relation among claims is necessary to trigger the entire controversy doctrine. In *Falcone v. Middlesex County Med. Soc.*, 219 A.2d 505 (N.J. 1966) (per curiam), the plaintiff brought an action for damages because the defendant would not allow the plaintiff to join its society. The plaintiff had previously sued the defendant in order to compel it to accept him as a member. The court found that the second action was barred by the first and stated that:

[The] elemental considerations of fairness to the other party and the urgent need for eliminating the delay and wastage incident to the fragmentation of litigation dictated that all of the aspects of the plaintiff's controversy be included within [one] legal proceeding.

Id. at 506.

Quoting from a Superior Court of New Jersey, Appellate Division case, we have said:

[If] the litigants in the action as framed will, after final judgment therein is entered, be likely to have to engage in additional litigation in order to conclusively dispose of their respective bundles of rights and liabilities which derive from a single transaction or related series of transactions, then the omitted component must

be regarded as constituting an element of the minimum mandatory unit of litigation. That result must obtain whether or not the component constitutes either an independent cause of action by technical common-law definition or an independent claim which, in the abstract, is separately adjudicable.

Melikian v. Corradetti, 791 F.2d 274, 279-80 (3d Cir. 1986) (quoting *Wm. Blanchard Co. v. Beach Concrete Co.*, 375 A.2d 675, 683-84 (N.J. Super. Ct. App. Div.), *certif. denied*, 384 A.2d 507 (N.J. 1977)). The first suit in *Melikian* involved a breach of contract claim. We held that New Jersey's entire controversy doctrine barred a subsequent suit against the same defendant for fraudulently inducing the plaintiff to sign the contract. *Id.* at 280.

In *Wm. Blanchard Co.*, the Appellate Division held that the claims of an owner of a building project against a general contractor were barred by the entire controversy doctrine. *Wm. Blanchard Co.*, 375 A.2d at 684. The owner and the contractor asserted claims against one another and also sought to assert their rights to contribution and indemnification against a number of subcontractors. *Id.* at 678. A plethora of earlier suits among subcontractors on the project resulted in the owner and general contractor's being named as third-party defendants. *Id.* at 679-81. While the litigation had begun as early as 1970, the owner did not raise the claims in question until mid-1975. *Id.* at 679-82. The separate lawsuit initiated by the owner was barred by the entire

controversy doctrine.⁵ Because all of the claims arose out of a construction project that was completed in 1971, the court held that the owner's claims were "a component of the controversy [that] may not be fairly withheld," *id.* at 684 (citing *State v. Gregory*, 333 A.2d 257, 264 (N.J. 1975), and "withholdable from the litigation only on penalty of forfeiture," *id.* at 685.

In *Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 523 A.2d 131, 135 (N.J. 1987), the court articulated various standards by which a court should determine if certain claims should have been brought together, including whether one claim was germane or related to the other claims. The court set these standards out against "the twin goals of judicial administration and fairness to litigants" that underlie the doctrine. *Id.*

These cases lend some plausibility to Rutgers' argument that the state-court action and Bennun's instant federal actions are part of a running dispute between him and Rutgers. While the state-court action only sought to compel arbitration, it did arguably arise from the same "related series of transactions," *see Melikian*, 791 F.2d at 279 (quoting *Wm. Blanchard Co.*, 375 A.2d at 683-84), that are the basis for this case: the repeated denial of a promotion to full professorship for Bennun.⁶ In fact, both the 1984 state-court

5. The claims of the general contractor, which were raised in 1975 as amended cross-claims in one of the earlier suits, were also barred because the court held that the trial court did not abuse its discretion by refusing an amendment at such a late date. *Id.* at 686-87.

6. As we next discuss, however, we do not think that the entire controversy doctrine applies to foreclose Bennun's Title VII and § 1981 actions, and *Melikian* therefore is distinguishable from this case.

action and the first of Bennun's three suits that were eventually consolidated to form this case are based on the 1980-81 promotion denial.

Still, the touchstone of the entire controversy doctrine is judicial efficiency, as Justice Brennan noted in *Ajamilan* and the Supreme Court of New Jersey recently reaffirmed in *Woodward-Clyde*. The application of the entire controversy doctrine normally promotes judicial efficiency, as the cases outlined above suggest. In this case though, the application of the doctrine to Bennun's federal claims would frustrate the doctrine's basic purpose by short-circuiting otherwise available methods of non-judicial dispute resolution. Were we to accept Rutgers' position, a person who has a contractually based right to non-judicial process would have to forego vindication of that right to preserve his judicial remedies. If he did seek to compel non-judicial resolution of the dispute, the court in which he sought that relief could not, under this interpretation of the entire controversy doctrine, efficiently resolve the limited issue presented and effectuate the parties' purpose of avoiding judicial resolution of the merits. Instead, the court would be drawn (inefficiently) into the merits of the dispute. Parties entitled to judicial enforcement of their contractual rights to arbitration would find that entitlement provided only at the expense of their contractual rights. This result stands in stark contrast to the purpose underlying the entire controversy doctrine.

Thus, even assuming that the claims arising from the 1980-81 and 1982 promotion denials were related to the 1984 state-court action, we hold that New Jersey's courts would not apply the entire controversy doctrine to this case because Bennun's course of action was the most judicially

efficient option open to him short of the Hobson's choice of either giving up his right to arbitration under the collective bargaining agreement or his right to sue in federal or state court on the merits of his unlawful discrimination claims. Bennun's state-court action was not "the trigger which . . . would start the chain reaction of other litigation to resolve the balance of the issue raised by the entire controversy," *Wm. Blanchard Co.*, 375 A.2d at 684 (quoting *Vacca v. Sitka*, 122 A.2d 619, 622 (N.J. 1956)), but rather an attempt to avoid litigation altogether.⁷

V.

Because the entire controversy doctrine does not bar Bennun's § 1981 claims or his Title VII claims we proceed to their consideration on the merits.

A.

We begin with Bennun's § 1981 claims.⁸ At the threshold Rutgers attacks the district court's

7. We have not forgotten that "fairness to litigants" is another policy that fuels the entire controversy doctrine. See *Woodward-Clyde*, 523 A.2d at 135. We do not see any unfairness in allowing these claims to proceed. Bennun has not withheld these claims in an attempt to suddenly spring them on an unsuspecting Rutgers. The precursors to these claims, the charges filed with the Commission, were pending at the time of the state-court action. There is no allegation by Rutgers that Bennun's various actions were intended to, or actually did, "harass" Rutgers. See *id.* Rutgers does not even claim that the course that Bennun has taken was an attempt to "delay final adjudication." *Id.*

8. Section 1981 reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

conclusion that Bennun had standing to sue under 42 U.S.C.A. § 1981 (West 1981). It argues that Bennun is not Hispanic under the test set forth in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). We have concluded, however, that it is not necessary to decide the question. We can instead dispose of Bennun's § 1981 claim on other grounds. The question of Bennun's standing to bring this § 1981 action is not one of those constitutional and prudential limitations that restrict a court's power to act and so must be resolved before we can proceed further on the merits. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982). Standing deficiencies of the kind Rutgers asserts are instead analogous to a party's failure to satisfy one element of a particular cause of action. See *Bell v. Hood*, 327 U.S. 678, 679-684 (1946) (discussing the difference between matters that go to a court's jurisdiction and those that go to a party's cause of action); see also *Air Courier Conf. of America v. American Postal Workers Union*, 59 U.S.L.W. 4140, 4142 n.3 (1991) ("Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided.") (citing *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979)). Indeed, our jurisdiction to hear Bennun's § 1981 claim is based on other statutes. See, e.g., 28 U.S.C.A. § 1331; 28 U.S.C.A. § 1343(a)(3), (4). Thus we do

of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

42 U.S.C.A. § 1981 (West 1981).

not have to reach the question of § 1981 standing to decide Bennun's § 1981 claim.

B.

Relying on *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) Rutgers contends that the district court erred when it ruled that Bennun stated a cognizable § 1981 claim because the change in status from tenured associate professor to full professor is not, at Rutgers, a change in position that creates or offers an opportunity for a new contract. The district court based its decision on four factors: (1) the "significant and substantial differences between the associate and full professor in terms of prestige and perception;" (2) the "differences in terms of function between the associate and full professor;" (3) the value of the position as evidenced by the elaborate promotion procedure; and (4) the stigma that accompanies the perennial rejection for promotion. *Bennun*, 737 F. Supp. at 1398. Since the parties do not dispute the facts as found by the district court but rather argue about the application of *Patterson*, the question, as presented, is one of law and our review is plenary. See *Doerinkel*, 835 F.2d at 1054 n.4.

Patterson limited § 1981's reach to racial discrimination in the making and enforcing of contracts. *Patterson*, 109 S. Ct. at 2375. Brenda Patterson was a teller and file coordinator at a credit union. *Id.* at 2368-69. She alleged that she was fired, harassed and, at one point, not promoted to an intermediate accounting clerk position because she was black. She further alleged that she was entitled to relief under § 1981 and North Carolina state law. *Id.* at 2369. The issue of importance to us is that she was not

promoted because she was black. The Supreme Court held that denial of such a promotion would only be actionable when it "rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 2377. Effectively, the Court held that in the promotion context a new "contract" is not made for purposes of § 1981 unless such a new and distinct relationship would flow from the promotion.

Rutgers takes issue with the district court's use of all but the second factor. It argues that "stigma," "perception" and "value" are all irrelevant to the analysis under the Supreme Court's decision in *Patterson*. It also disagrees with the district court's conclusion that the position of tenured associate professor was so functionally different from the position of professor that it met the *Patterson* requirements. Rutgers says both positions are supervisory and while there may be a new contract within the *Patterson* rationale when there is a change from a non-supervisory to a supervisory position, that is not so when the change is just from one supervisory position to another. We agree with Rutgers' criticism of the district court's use of the value, stigma and perception factors. None of them indicate the creation of a new contract because they do not touch any of the terms of the contract as to duties, tenure, compensation or essential function. Virtually all of the research and student-oriented responsibilities of Full Professors and tenured Associate Professors are the same. Holders of these two positions do nothing different day-in and day-out except for those few weeks out of the year when they evaluate candidates, if any, for a full professorship.

Based on its argument that no substantial difference exists between the two positions at Rutgers, the University would have us conclude that there is no analogy between a change to the position Bennun covets from the one he holds. To resolve this question we turn to the record. It shows that both Associate and Full Professors evaluate all faculty candidates for promotion up to the level of Associate Professor, but Associate Professors have no role in deciding who get the status of Full Professor. The teaching, research and advisory functions of tenured Associate Professors and Full Professors are the same and both groups are members of the same collective bargaining unit. The single difference between the two positions is participation in the review of candidates for promotion to Full Professor. This, Rutgers says adds only one advisory capacity and cannot of itself create a new contract for tenured associates who attain a full professorship within the meaning of *Patterson*.

Bennun, however, points out one other difference between Full Professors and tenured Associate Professors. Only Full Professors are eligible to become members of, or to review candidates for, the four President-appointed spots on the Promotion Review Committee. This is the committee that ultimately makes recommendations to the President about changes in faculty status. In addition, the process used to evaluate candidates for Full Professor is also used to evaluate candidates for tenure. Since the grant of tenure creates a new contract, Bennun asks us to infer that use of the same process in evaluating candidates for Full Professor shows attainment of status as a full professor also creates a new contract. We reject at once this last stated

argument and move quickly on in our analysis. The end result of a tenure award is vastly increased responsibilities and benefits. The tenure award represents a change in the fundamental terms of the contract. No commensurate change occurs with an award of full professorship.

42 U.S.C.A. § 1981 states in part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts" In *Patterson*, the Supreme Court supplied a working definition of when a promotion entails a new contract. See *Patterson*, 109 S. Ct. at 2372. Since § 1981 does not protect post-formation discrimination this definition is crucial. See *id.* at 2377. A promotion becomes actionable under § 1981 when "the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." *Id.* In further explanation the Supreme Court referred to *Hishon v. King & Spalding*, 467 U.S. 69 (1984). See *Patterson*, 109 S. Ct. at 2377. *Hishon* was a Title VII case. It involved a law firm's discriminatory refusal to promote an associate to partner. *Hishon*, 467 U.S. at 71-72. The Court cited *Hishon* as an example of a "new and distinct relation between the employee and the employer." *Patterson*, 109 S. Ct. at 2377. The Fifth Circuit has thoughtfully considered the Supreme Court's citation to *Hishon*:

The difference between rights, duties, and compensation of associates and partners in a law firm are significant. While both the associate and partner are attorneys, the role of partner is supervisory and carries increased responsibility. It may also involve personal liability for the affairs of the firm. The method of compensation and amount of benefits attendant to an associate position differ from those of a partner.

Harrison v. Associates Corp. of North America, 917 F.2d 195, 198 (5th Cir. 1990) (finding no new contract in a promotion from computer operator to lead computer operator where there were "no significant change in duties and responsibilities"). We do not think that the change in status from tenured Associate Professor to Full Professor at Rutgers is like the change from associate to partner in a law firm. The change in status in Bennun's case is much closer, essentially, to the change in positions in *Harrison*. The differences in the duties between the two academic ranks and the jobs of the workers are, in both cases, too small for the creation of a new contract under *Patterson*. For this reason, we hold that the promotion of a tenured Associate Professor to Full Professor at Rutgers is not a new contract for purposes of § 1981. Therefore, Bennun's § 1981 claim must fail.⁹

VI.

Rutgers' final contention is that the district court erred in holding that Rutgers violated Title VII when it denied Bennun a promotion to full professor. This attack, largely fact bound, proceeds on several fronts.

A.

Before considering Rutgers' arguments on the merits of Bennun's Title VII claims we will outline in general terms the law relating to burdens of proof and sufficiency of the evidence in Title VII cases.

9. Of course, we imply nothing about the meaning of a promotion to full professor at other institutions of higher learning. Our holding is based only on the application of *Patterson* to Bennun's situation at Rutgers, as it is shown on this record.

Insofar as Rutgers' challenges go to the sufficiency of the evidence to support the district court's finding of discrimination, we review for clear error. See *Belitssimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985) (citing Fed. R. Civ. P. 52(a)), *cert. denied*, 475 U.S. 1035 (1986), *overruled on other grounds*, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). To the extent it challenges the district court's application of law to the facts as found, our review is plenary. See *Logue v. International Rehabilitation Assocs., Inc.*, 837 F.2d 150, 152 (3d Cir. 1988).

The alternating burdens of proof in a Title VII discrimination case are allocated as follows. First, the plaintiff must establish a *prima facie* case of discrimination. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). The proof has three prongs. The plaintiff must prove by a preponderance of the evidence that he is a member of a minority; that he applied for, is qualified for and was rejected for the position sought, and that non-members of the protected class were treated more favorably. *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). After this showing is made, the defendant may rebut the discriminatory presumption by showing that there was a "legitimate, nondiscriminatory reason" why someone else was preferred. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant does so, then the burden, now an ultimate one, is reassigned to the plaintiff and the plaintiff must show that the reasons proffered by the defendant are pretextual. See *id.* at 804; see also *Kunda v. Muhlenberg College*, 621 F.2d 532, 541-42 (3d Cir. 1980) (quoting *McDonnell Douglas Corp.*, 411 U.S.

at 802) (discussing Title VII burdens of production).

This Court has held that "more than a denial of promotion as a result of a dispute over qualifications" must be shown to prove pretext. *Molthan v. Temple Univ.*, 773 F.2d 955, 962 (3d Cir. 1985). In *Molthan*, a case also involving a tenured associate professor who sought a promotion to full professor, we decided that the plaintiff's *prima facie* case had been rebutted by Temple's proffered nondiscriminatory reason for failing to promote her. Temple argued that the plaintiff was denied tenure because "the majority of those who voted on each of [the plaintiff's] promotion decisions believed that she was not qualified for promotion." *Id.* (citing *Zahorka v. Cornell Univ.*, 729 F.2d 85, 94 (2d Cir. 1984)). The plaintiff attempted to show pretext by establishing that she had been recruited under the implication that tenure would follow, that she was granted tenure, that Temple had tried to persuade her to change the department she was assigned to and that the majority of full professors at Temple were male. *Id.* We held that the plaintiff's evidence "raise[d] no inference of sex discrimination," *id.* at 963, and that:

[F]or a plaintiff to succeed in carrying the burden of persuasion, the evidence as a whole must show more than a denial of tenure [or promotion] in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university.

Id. at 962 (quoting *Zahorka*, 729 F.2d at 94). We have, however, held that such a dispute will satisfy the earlier hurdle of establishing the qualifications

of the professor, as long as the plaintiff demonstrates that "he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." *Roebuck*, 852 F.2d at 726 (quoting *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 63 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981)). We also noted, citing to *Burdine*, 450 U.S. at 256, that actual evidence of discrimination is not needed to disprove pretext. Rather, proof that the employer did not act for the reason asserted is enough. *Roebuck*, 852 F.2d at 726.

B.

With this general outline of the shifting burdens of proof in Title VII cases, we pass to consider Rutgers' individual arguments against Title VII liability.

1.

We consider first Rutgers' argument, renewed in the Title VII context, that Bennun cannot recover because he failed to show that he is Hispanic and therefore has not established the first element necessary for a Title VII *prima facie* case, that he is a member of a protected class. See Brief for Appellants at 29, n.18. Citing to Bennun's testimony, Rutgers argues:

His mother, Ann Odesser, was born in what is now Romania and first spoke Romanian [Jt. App. at 209]. His father, Leon Bennun, was born in what is now Israel and first spoke Ladino, a dialect used by Sephardic Jews [Jt. Ap. at 210]. Plaintiff conceded that neither his mother nor his father is Hispanic [Jt. App. at 209-10].

Brief of Appellant at 26. Therefore, Rutgers says that Bennun cannot be Hispanic because his forebears did not come from that ethnic group. Rutgers made this argument in its attack on Bennun's § 1981 claim but by reference adopted the argument that Bennun was not Hispanic as a basis for defeating Bennun's Title VII *prima facie* case. *Id.* at 29, n.18; Reply Brief of Appellant at 24, n.14. Though *Patterson v. McLean* made it unnecessary to decide Bennun's ethnic origin in the context of his § 1981 claim, we must face it in the Title VII context.

Initially, we reject Bennun's contention that Rutgers waived the argument that he is not Hispanic by its concession to the district court that he had standing under Title VII. See *Jt. App.* at 2260. This concession did not relieve Bennun of the need to establish a *prima facie* case on the merits of his Title VII claim. One element of that *prima facie* case is proof of membership in a class the statute protects.

Rutgers' argument that Bennun cannot recover on his Title VII claim unless he proves he is Hispanic implies that the minorities protected by Title VII are the same as those § 1981 covers. It fails to confront differences between groups protected by § 1981 and Title VII. Rutgers does not cite any authority for its assertion that the minorities Title VII protects are only those who have standing under § 1981. It relies on *Saint Francis College v. Al-Khazrafi*, 481 U.S. at 607, a case decided in the context of § 1981. *Al-Khazrafi* did not hold that a lack of standing under § 1981 implies a lack of protection under Title VII. The Equal Employment Opportunity Commission (EEOC), the agency charged with interpreting Title VII, has concluded otherwise and its regulations

would allow Bennun to rest his claim solely on his national origin, *see* 29 C.F.R. § 1606.1 (1990), a basis that would not be sufficient for a § 1981 claim under *Al-Khazraji*. *See Al-Khazraji*, 481 U.S. at 613.

Rutgers' contention that Bennun cannot prevail upon his Title VII claim if he is not Hispanic also ignores the language of § 2000e-2. It provides, in material part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(a). Section 1981 does not mention national origin. It provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981. If *Al-Khazraji* does not control in cases arising under § 2000e-2, Bennun's status as a member of a protected group could be based on his conceded national origin as a native of Argentina.

On this record, however, we are unwilling to rest our holding that Bennun has proven that he is a member of a minority protected by Title VII on his national origin. There are several reasons. First, it would be unfair to Rutgers to base our decision on that theory. The parties did not try this case on the theory that Rutgers unlawfully discriminated against Bennun because of his birth in Argentina.

Secondly, the district court's findings and opinion indicate to us that Bennun had persuaded it that he was discriminated against as an Hispanic. They give no hint that the district court was also persuaded Bennun would have been denied promotion simply because he came from Argentina. We are therefore unable to conclude that there would have been the same ultimate finding of unlawful discrimination if Bennun were Argentinian by birth, but not Hispanic in culture, language and appearance. Accordingly, we will not rely on his national origin as an Argentinian to show he is a member of a protected minority under Title VII.

Rutgers' argument that Bennun has not shown he has an ethnic basis for his Title VII claim, as an Hispanic, nevertheless falls in this case. The district court's finding that Bennun was Hispanic can be disturbed by this Court only if it is clearly erroneous. See *Bellissimo*, 764 F.2d at 179. Although this finding was made in addressing Rutgers' § 1981 attack, if it is not clearly

erroneous. It necessarily supports the district court's ruling on Bennun's Title VII claim. The district court noted Bennun's uncontradicted assertion in an affidavit that his father was a Sephardic Jew who, like all Sephardic Jews, traced his lineage to those Jews who were expelled from Spain during the Spanish Inquisition of 1492. The court, however, based its finding that Bennun is Hispanic on his birth in Argentina, his belief that he is Hispanic, identifies with and continues to adopt Spanish culture in his life and speaks Spanish in his home.

The district court's determination that Bennun is Hispanic is not clearly erroneous. The word "Hispanic" has been defined as "of, or derived from Spain or the Spanish." Webster's New Dictionary and Thesaurus 262 (Concise ed. 1990). Bennun's uncontroverted assertion that his father is a Sephardic Jew meets the dictionary definition of Hispanic. Rutgers' argument that Bennun conceded that his father was not Hispanic subtly misconstrues the record. At his deposition, Bennun, in response to Rutgers' counsel's question, "Do you contend that your father is Hispanic?," Jt. App. at 210, answered "No," *id.* However, Bennun went on to explain that he did not *contend* that his father was Hispanic because it is a *fact* that he was by virtue of his Sephardic roots.

Bennun's birth in a Latin American country where Hispanic culture predominates, his immersion in Spanish ways of life and the fact that he speaks Spanish in the home also support this conclusion. Census information often relies on the primary language spoken in the home as a means of classifying persons by race. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 486 n.5

(1977). In addition, the district court was able to see Bennun firsthand. The district court's opportunity for observation about Bennun's appearance, speech and mannerism is informative as we apply the clearly erroneous standard in reviewing the finding by the district court that Bennun is Hispanic. We think unlawful discrimination must be based on Bennun's objective appearance to others, not his subjective feeling about his own ethnicity. Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits. It results in a stubborn refusal to judge a person on his merits as a human being. Our various statutes against discrimination express the policy that this refusal to judge people who belong to various, particularly disadvantaged, groups is too costly to be tolerated in a society committed to equal individual liberty and opportunity. Thus, coupling the evidence the cold record presents with the district court's opportunity to observe Bennun, we hold that its determination that he was Hispanic is not clearly erroneous.

2.

Having found that Bennun was Hispanic for purposes of Title VII, the district court went on to consider whether Bennun had established the other elements necessary for a *prima facie* case. It began this analysis by noting that Bennun conceded that there was no direct evidence to support a *prima facie* case of discrimination, but relied instead on circumstantial evidence of disparate treatment. See *Bennun*, 737 F. Supp. at

1400. We examine the record with respect to the remaining elements of Bennun's *prima facie* case in that context.

One of the elements Bennun must show to make out his *prima facie* case is "that he applied and was qualified for a job for which the employer was seeking applicants." *McDonnell Douglas Corp.*, 411 U.S. at 802. The district court recognized that, in an academic setting, decisions about promotion are best left to the academics. *See Bennun*, 737 F. Supp. at 1409. Rutgers complains that the court nevertheless functioned as a "Super-Tenure Board" and determined that Bennun was qualified for the position of Full Professor without giving any deference to the judgments of Bennun's academic evaluators. Rutgers notes that of the seven levels of review available in 1980-81, Bennun was viewed favorably by only two. Of the ten other professors whose promotion packets were submitted into evidence, all received approval at at least five levels while seven, including Somberg, received approval at all seven.

Bennun dismisses Rutgers's argument that the court should have paid more heed to the academic judgments of the evaluators because it is these very judgments that are poisoned by discriminatory animus. Bennun contends that the district court was correct in looking at the evaluations made by the other professionals in his own department and his international recommendations to determine that he was qualified for the position of full professor. He points out that once the district court had reason to question the objectivity and neutrality of Bennun's evaluators, it appropriately "evaluated the underlying evidence contained in the

promotion packets and the peer review letters to determine whether reasonable, non-discriminators could plausibly reach and recite the conclusions university spokespeople expressed." Brief for Appellee at 29-30.

Kunda v. Muhlenberg College is the seminal case on this topic in our Court. The plaintiff in *Kunda* was an instructor who, after five years at Muhlenberg, was considered for tenure and promotion to Associate Professor. *Kunda*, 621 F.2d at 536-37. She was turned down and, despite several appeals in her favor within the college's reassessment procedures, received a terminal contract for the 1974-76 academic year. The President of the school stated that she was denied promotion because she lacked a terminal degree in her field. However, the plaintiff was able to show that three people without terminal degrees were promoted during the period of her employment at Muhlenberg. The district court determined that *Kunda* had set forth a case of discrimination. *Id.* at 536-40. This Court affirmed. In *Kunda* we stated that no *special* deference is to be paid to the tenure and promotion decisions of universities when they are scrutinized under Title VII because:

The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.

Id. at 550. We did, however, caution courts not to "substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure." *Id.* at 548.

Kunda was followed by *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). In *Franklin & Marshall*, the main issue was whether the school had any privilege to withhold discovery of peer review materials. There the Commission was investigating an allegation of discrimination by the College in violation of Title VII. *Id.* at 111. It sought to compel the disclosure of confidential peer review materials "[f]or each individual *granted or denied* tenure" over approximately a five year period. *Id.* at 112 (quoting EEOC subpoena) (emphasis in quoted material). In *Franklin & Marshall*, this Court rejected any special treatment of academic institutions, unlike the Second Circuit in *Gray v. Board of Higher Educ., City of New York*, 692 F.2d 901, 904 (2d Cir. 1982) (adopting a balancing approach towards compelling discovery in the academic context), and the Seventh Circuit in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337-38 (7th Cir. 1983) (recognizing a qualified privilege protecting materials related to the peer review process). Instead, we held that there is no privilege in such materials and moreover, no balancing process is needed before disclosure of peer review materials relevant to the investigation is required. We held that "[n]o inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation." *Id.* at 115. The relevancy of these

peer review materials to an investigation of unlawful discrimination within the academy logically implies that they are to be used in determining whether discrimination has taken place. Indeed, the Supreme Court vindicated this Court's position just last year when it held that there was no special privilege that exempted university peer review materials from the scope of the Commission's subpoena powers. *University of Pa. v. EEOC*, 110 S. Ct. 577, 582 (1990) ("[W]e cannot accept the University's invitation to create a new privilege against disclosure of peer review materials.").

Accordingly, the district court sought to determine if Bennun had demonstrated that he was qualified for a full professorship. In summarizing Bennun's bid for a full professor's title the district court began with the 1978-79 review.¹⁰ In that review Bennun's research and scholarly activity was rated outstanding by his department, his professional activity was rated above average and his teaching and general usefulness were regarded as average to below average. The department voted in favor of promotion. The Appointments and Promotions Committee, voting against promotion, rated him above average in scholarly activity and research, primarily because his publication in refereed journals¹¹ was modest, average to below average in teaching and general usefulness, but this

10. For a detailed history of Bennun's bids for promotion, see typescript, *supra*, at 7-17.

11. Publication in a refereed journal means that it has been reviewed by peers in the field before it is published. Thus, a work published in refereed journals is more significant than a similar article published in a non-refereed journal.

committee noted he was "extraordinarily active" in his professional activity. *Id.* at 1401-02. The Dean, who also voted in favor of promotion, rated him above average to outstanding in scholarly activity, professional activity and research, although he noted that there "continues to be a question about his research," *id.* at 1402, and rated him average to below average in teaching and general usefulness. The Promotion Review Committee found "insufficient evidence of distinction in teaching and scholarly work to warrant promotion." *Id.*

Bennun's credentials at the time of the 1978-79 review included twenty refereed articles, eight of which had been written in the eight years since he was granted tenure. Bennun had also published a large number of abstracts and papers which are shorter than articles, delivered a substantial number of lectures and continued to receive significant grant support and teach classes covering a wide variety of subjects. Bennun had outside letters submitted by four internationally known persons in his field who wholeheartedly recommended him. See typescript *supra* at 12. Three of these letters were solicited by Bennun and one was solicited by the University. *Id.*

The district court then reviewed Bennun's credentials as of his 1980-81 review for promotion from tenured associate to full professor. This was one of the reviews at issue. Bennun's lectures, presentations and abstracts continued to increase. The department again recommended him for promotion, this time 5-0-1. His ratings were the same as in 1978-79, except that his teaching and general usefulness had increased to average and average to above average respectfully. The

Appointments and Promotions Committee unanimously rejected Bennun, rating him average in every category except professional activity where he was rated above average. This committee was critical of the lack of outside acknowledgment of Bennun's research, his failure to receive outside funding, and was convinced that the department was withholding a letter that spoke unfavorably of Bennun. The Dean recommended Bennun, while the section, critical of Bennun's output, and the Promotion and Review Committee recommended against promotion. *Id.* at 1402-03.

Finally, after reciting "a similar pattern" in the 1983-84 application,¹² the district court found that Bennun had proved that he was qualified for promotion. *Id.* at 1403-04.

Rutgers takes issue with the district court's conclusion that Bennun is qualified for promotion to full professor. As we have explained:

[I]n order to satisfy the qualifications element of [a *prima facie* case], plaintiff "need only show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure

12. None of Bennun's claims are based on the 1983-84 promotion denial. The district court specifically did not review Bennun's 1984-85 promotion denial. It may not have done so because the 1984-85 review was based on largely the same material considered in the 1980-81 review and some of the 1982 votes were used without a new review. See typescript, *supra*, at 16.

could be justified as a reasonable exercise of discretion by the tenure-decision making body."

Roebuck, 852 F.2d at 726 (quoting *Banerjee*, 648 F.2d at 63) (citations omitted); see *Fowle v. C & C Cola*, 868 F.2d 59, 64 (3d Cir. 1989). The positive votes from his own department year after year and the favorable letters of recommendation that Bennun received from various world renowned scientists in his field show objectively that Bennun was at least in this middle group of candidates for full professor. In addition, the Dean also favored Bennun's promotion in 1980-81 and 1982 as did the section in 1984-85.

Rutgers maintains that Bennun cannot be in the middle group of tenure candidates because he received support at only a few levels of review while the ten professors he was compared with received support from almost every level of review. See Brief of Appellant at 33. Rutgers misunderstands the analysis set forth in *Roebuck* concerning the "middle group" test. Whether a candidate is in the middle group for *prima facie* case purposes is not to be determined by whether he was in the middle group of those applicants whose credentials are in evidence. Rather, the middle group is the group whose members' bids for advancement are debatable.

There is no need to sift through Bennun's credentials in any detail in connection with his *prima facie* case. The divergent votes of the various review groups show the sufficiency of Bennun's scholarly and academic credentials for attainment of the rank of full professor was debatable among the peers who evaluated him. See *Molthan*, 778 F.2d at 962 (quoting *Zahorka*, 729 F.2d at 94).

Accordingly, the district court correctly concluded that Bennun's showing was sufficient to meet the qualification prong of his required *prima facie* case.

3.

The presence of the final requirements of Bennun's *prima facie* case are apparent from the record. Despite his qualifications for the position of Full Professor, Bennun was rejected, and Full Professorships were available at the time he was refused promotion. See *McDonnell Douglas Corp.*, 411 U.S. at 802; *Roebuck*, 852 F.2d at 715 (quoting *Banerjee*, 648 F.2d at 62). The district court then sought to determine if he had proved that non-minorities were treated more favorably than he was, the third prong of his *prima facie* case. In doing so, the district court compared Bennun's file to that of Dr. Ethel Somberg, a member of the same department as Bennun. Somberg was promoted to full professor in 1978-79. *Id.* at 1404. Her candidacy received support at all levels. The department rated her outstanding in teaching, scholarly activity and general usefulness and above average in research and professional activity. The Appointments and Promotions Committee gave Somberg the same marks that the department did except that it rated her above average to average in research. The Dean rated her outstanding in general usefulness, above average to outstanding in teaching, above average in scholarly activity, average to above average in research and average in professional activity. The Dean thought that her research was considerable after taking account of her teaching load. He also discounted the fact that some of her supporting letters were old and that few spoke to her overall contribution to her discipline. *Id.*

Somberg had a total of seventeen publications. Only six of them were in refereed journals. She had no invited presentations and no outside letters from internationally known persons working in her field. *Id.* at 1404-05. All of this amply shows that Somberg was treated more favorably than Bennun. The district court did not err when it concluded Bennun had met his burden of making out a *prima facie* case of discrimination under Title VII.

C.

Rutgers insists that the district court did not properly consider the non-discriminatory reason it says prevented Bennun's promotion. By not paying sufficient attention to Bennun's teaching effectiveness, general usefulness and professional activity, Rutgers argues that the court ignored an objective non-discriminatory basis for promoting Bennun. The district court concedes that the University met its production burden at the second step of the *McDonnell-Douglas-Burdine* analytical framework by articulating Bennun's asserted lack of qualification as a non-discriminatory reason for not promoting Bennun to full professor. After reviewing all of the packets, it held that Rutgers' assertion that Bennun's research was "uncreative, moderate in quantity and insufficiently recognized in his field", constituted the proffer of a legitimate non-discriminatory reason for denying him tenure. *Id.* at 1407. Under Rutgers' criteria, Bennun had to be rated outstanding in one area, and short of that, he could not be promoted.

The district court, having decided that Rutgers had shown a nondiscriminatory reason for denying Bennun tenure, namely that Bennun was not promoted because the University's evaluators thought his research was deficient, *see id.*, went

on to consider pretext. On appeal, Rutgers further contends that the district court erred in not considering Bennun's lower marks in teaching effectiveness, general usefulness and professional activity in evaluating its reasons for not promoting Bennun. Because it would not alter our decision we will accept these reasons for purposes of analysis and gauge the district court's finding of pretext against them.

D.

The pretext issue is the dispositive one. The district court concluded that Bennun had carried his ultimate burden of showing pretext. The court was persuaded that the reason Rutgers assigned for denying Bennun's promotion, the poor quality and insufficient quantity of his research, was a pretext concealing the fact that Rutgers had applied a different standard to Bennun than it had to Somberg who was a member of a favored class.

1.

The reader will recall that the record shows the Appointment and Promotions Committee concluded that Somberg's research was acceptable in terms of both quantity and quality. The district court pointed out that Bennun had published an appreciably higher number of articles and that he had received favorable reviews from internationally known scholars. Yet the quantity of Bennun's research was rated as "moderate," somewhat lower than Somberg's "excellent." See *id.* at 1405. This discrepancy helped persuade the district court that Rutgers' proffered reason for denying Bennun promotion to full professor was pretextual. Accordingly it held that Rutgers had violated Title VII by discriminating against Bennun. *Id.* at 1409.

Rutgers says that the district court erred in comparing Bennun to Somberg because they were not similarly situated and therefore, like the proverbial apples and oranges, cannot be compared. Rutgers notes that Somberg was promoted because she was rated outstanding in both teaching effectiveness and general usefulness while Bennun was not. For example, while Somberg had been rated uniformly higher than Bennun in teaching, the district court disregarded this because Bennun had taught a similar number of courses. The court pointed out that a single-lecture peer evaluation demonstrated no material difference between the two of them. *Id.* at 1406 & n.14. Rutgers contends that its comparison was misleading. Rutgers also notes that the packets of Somberg and Bennun the district court used for comparison were from different years. Thus the composition of some of their reviewing committees may have been different.¹³ In essence, Rutgers contends that

13. Rutgers also notes that Bennun's 1980-81 evaluation took place after the University had decided to change its focus and become a nationally known research school. As a result, while the criteria remained the same, Rutgers contends that the standards for meeting the criteria were heightened in December of 1980. J.A. at 746-47. However, Rutgers has not produced any evidence that these standards were actually applied to Bennun in 1980-81. In fact, such an application would be surprising considering that Bennun had already been reviewed by his department when the Board of Governors approved Rutgers's change in mission. See J.A. at 746-47 & 1249A. This would mean that the standards were heightened during the review of Bennun in 1980-81. Because it has not been demonstrated that this mid-stream shift in standards occurred the issue is not before us, but if it was, the fairness of the entire process would be open to question.

Somberg was an outstanding teacher and did not need to be an outstanding researcher to be promoted. It says that Bennun conversely was not outstanding in either. However, because Bennun's main emphasis was on research, Rutgers concedes that his packet was evaluated in that light and this explains the differences between the evaluation of their research undermines any comparison between them.

Bennun takes issue with Rutgers' definition of "similarly situated." To define it as narrowly as Rutgers does, he says, would effectively isolate a university's promotion and tenure decisions from meaningful judicial review. Additionally, he notes that Rutgers' own policy encourages the comparison of colleagues having the same or similar duties. Bennun notes that the key factors for comparison are a candidate's length of service and his accomplishments in his particular field. Because both of these were similar, a comparison was appropriate.

2.

Before considering the pretext issue directly we must first confront the sub-issue of whether the district court's comparison of Bennun and Somberg's packets was proper. The district court based its decision that Bennun and Somberg were similarly situated on the fact that both Bennun and Somberg are biochemistry professors in the Zoology and Physiology Department at Rutgers' Newark campus. See *Bennun*, 737 F. Supp. at 1404. Rutgers contends that they were not similarly situated because Somberg was rated outstanding in two categories, teaching effectiveness and general usefulness, and Bennun was not rated as highly in these categories.

We cannot accept Rutgers' position. It would change "similarly situated" to "identically situated." In *Franklin & Marshall* we allowed the Commission to subpoena a college for information on all persons considered for tenure over approximately a five-year period. See *Franklin & Marshall*, 775 F.2d at 112-17. Although *Franklin & Marshall* involved a determination of the relevancy of such information, see *id.* at 116, the broad sweep of relevancy we used to decide that case implies that two professors in the same specialty who are evaluated within two years of each other by the same college can sometimes have their credentials compared. The propriety of such comparison is case-specific. We must therefore determine whether comparison between Somberg and Bennun is appropriate here. We hold that even if Somberg was a "teaching-oriented" professor and Bennun was a "research-oriented" professor, as Rutgers contends, a comparison between the two can be made to determine if Rutgers' five objective criteria for advancement to full professor were evenly applied.

Though the district court focused only on the disparity between the standards applied to Bennun and Somberg with regard to their research qualifications, Rutgers' disparate treatment of Somberg and Bennun by itself is enough to preclude a holding that the district court's rejection of Rutgers' reason for not promoting Bennun was clear error. The district court simply found Rutgers' reason "unworthy of credence." *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas Corp.*, 411 U.S. at 804-05). The district court, not this Court, finds facts and assesses credibility. Like any factfinder, it can accept some parts of a

party's evidence and reject others. It may also, like any factfinder, assess credibility in light of the maxim, *falsus in uno, falsus in omnibus*. See Black's Law Dictionary 543 (5th ed. 1979) (defined as "false in one thing, false in everything"). We are unable to say, as a matter of law that it erred in its determinations.

To demonstrate the lack of clear error in the fact findings that underlie the ruling on pretext, we turn again to the record. One of the more glaring examples of disparate treatment was the Appointments and Promotions Committee's conclusion that Somberg's publications were "above average in quantity," Jt. App. at 1829, while Bennun's publication rate was questionable. Somberg had only seventeen publications of any type since becoming an Associate Professor in 1964, while Bennun had thirty-five since joining the faculty at Rutgers in 1969. Over a fifteen year period (1964-79) Somberg had eighteen fewer publications than Bennun did over a twelve year period (1969-81). These facts indicate that it is not an unwarranted invasion of the college's tenure process to determine that Bennun was held to higher standards in objective terms.

The difference in the treatment of the two candidates is even sharper in the section's ratings. The section rates candidates only on their research and scholarly activity. Yet the section wrote that Somberg's "recent publications [were] evidence of continuing research activity," Jt. App. at 1832, while Bennun was downgraded because his "total output [was] insufficient," Jt. App. at 1256. This conclusion is surprising because Somberg published only three pieces over the three years prior to her promotion (1976-79) while Bennun published eight pieces in the three years (1978-81)

prior to his promotion denial in 1980-81. The section recommended Somberg for promotion despite the fact that her recent career production was inferior to Bennun's. This is another clear example of the disparate treatment that Bennun was subjected to.

Rutgers' argument that the Somberg and Bennun decisions are unassailable when all five criteria are considered together also fails to withstand analysis. Rutgers contends that Bennun was not rated outstanding in any category in the later stages of review and therefore could not have been promoted under any circumstances. But if throughout the promotion process the same standards applied to Somberg had been applied to Bennun, an unbiased observer might reasonably conclude that Bennun should have gotten at least one outstanding rating. If so, the district court, as factfinder, did not clearly err by drawing the conclusion that differing standards were applied to Bennun and Somberg, to Bennun's detriment, when the Appointments and Promotions Committee rated Bennun average in research accomplishments and rated Somberg above average.

Of course, we recognize the difference between Somberg, primarily a teacher, and Bennun, primarily a researcher. Still, whatever particular areas of strength or weakness one or the other promotion candidate has, an evaluation based on objective criteria requires all those criteria to be objectively applied. If that is done then one candidate's strength will offset his weakness in comparison with another's strength and the converse will permit objective comparison. Here, Bennun's strengths were not given the same overall weight as were Somberg's. In one of

Bennun's stronger areas, research accomplishments, he was held to a higher standard than Somberg. Rutgers' articulated nondiscriminatory reliance on the five criteria, taken as a whole, in deciding not to promote Bennun is so undermined by its inconsistency in applying them that we cannot hold the district court's finding was clearly erroneous.¹⁴ The district court did not commit clear error in finding Rutgers's assigned reason for denying Bennun the rank of full professor was a pretext. Therefore, the district court did not err in holding Rutgers is liable to Bennun for unlawful discrimination in employment under Title VII.

VII.

Because of the many issues in this case we close with a summary of our holdings. Bennun's claims are properly before us. We believe that New Jersey's courts would not apply the entire controversy doctrine to bar Bennun's civil rights claims. To so apply it would be anomalous: a doctrine driven by a goal of judicial efficiency would be used to undercut the use of non-judicial methods of dispute resolution. On the merits, we hold that Bennun cannot prevail on his § 1981 claim because the promotion of a tenured associate professor to full professor at Rutgers does not create the new and distinct employment relationship needed to meet *Patterson's* holding that a § 1981 plaintiff must show he was

14. The district court's decision did not stand on this ground alone as it noted many other inconsistencies between the evaluation of Somberg and Bennun. See typescript, *supra* at 7-8. These inconsistencies further buttress the district court's decision.

discriminated against in the formation of a contract.

We also hold that the district court did not err in determining that Bennun successfully made out a claim of discrimination under Title VII. The differences of opinion about his qualifications among the various reviewing groups were sufficient to establish that his fitness for promotion was debateable. Because Rutgers did not challenge the other portions of Bennun's *prima facie* showing, resolution of this requirement in Bennun's favor completes his *prima facie* case. Rutgers articulated Bennun's lack of qualifications as its non-discriminatory reason for denying his promotion to Full Professorship. Bennun has carried his ultimate burden of persuading the district court, as factfinder, that Rutgers' proffered reasons were mere pretexts. In particular, Rutgers' disparate treatment of Bennun's research accomplishments bear this out. Since Bennun produced enough evidence of pretext to make out a *prima facie* case of discrimination, Rutgers is liable to him under Title VII. We will therefore affirm that part of the district court's order granting judgment for Bennun on his Title VII claim. We will reverse that part of the district court's order granting judgment for Bennun on his § 1981 claim. Finally, because all of the relief that Bennun received on both claims flowed from Rutgers' liability on Bennun's Title VII claim alone, we will not disturb the district court's remedial order. Costs will be taxed against appellant.

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*Clerk of the United States Court of Appeals
for the Third Circuit*

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 84-4655
HON. NICHOLAS H. POLITAN

DR. ALFRED BENNUN,

Plaintiff,

v.

RUTGERS, THE STATE UNIVERSITY,

Defendant.

OPINION AND ORDER

POLITAN, District Judge

APPEARANCES

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Plaintiff, Dr. Alfred Bennun, is an associate professor of Biochemistry at Rutgers, The State University. He instituted this action on November 13, 1984 alleging that the University failed to promote him to the rank of full professor in 1981, 1982, and 1985 because of discrimination on the basis of his national origin and in retaliation for prior litigation against the University. Specifically, Bennun charges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and the Civil Rights Act of 1870, 42 U.S.C. § 1981. The following constitutes my findings of fact and conclusions of law.¹

Plaintiff is Hispanic, born and educated in Argentina. He earned his PhD in Biochemistry at the University of Cordoba in 1963. He completed post-doctoral research at the University of Buenos Aires, Duke University, the Weitzman Institute, Cornell University and the Public Health Institute in New York. He joined Rutgers' Department of Physiology and Zoology in August 1969

1. Also before the Court is Bennun's claim that he was denied equal teaching and committee assignments. At the close of Plaintiff's case, defendant moved to dismiss these claims. Plaintiff did not object, arguing that Bennun did not assert these allegations as independent causes of action but rather used them to show the circumstances under which Bennun was forced to work. The court finds, therefore, that plaintiff waived these claims as independent causes of action and does not address them as such.

as an Associate Professor without tenure. In November 1970 Bennun's department unanimously recommended that he be given tenure. A variety of controversies thereafter arose and Bennun was not promoted but was rather given a "terminal" contract for one year. In 1972 Bennun initiated litigation against Rutgers and several professors alleging that they had maliciously interfered with his right to contract. In June 1972 Bennun was given tenure.

Between 1975 and 1978 Bennun either initiated or participated in numerous EEOC and civil actions against the University charging it with a variety of discriminatory practices against Bennun and other Hispanics. In particular, Bennun complained that he was consistently given inadequate office space in retaliation for his actions against Rutgers. In 1978 Associate Dean Rafael Caprio was assigned to investigate the substance of Bennun's office space complaints. Caprio found that Bennun had been provided with office and research space significantly less than other members of his department in his discipline.

In 1979, 1981, 1982 and 1985 Bennun sought promotion to full professor and was denied. In 1981 Bennun filed a grievance alleging that the 1980-1981 evaluation was arbitrary and capricious, based on personal prejudice and discrimination. The Grievance Committee recommended that Bennun be evaluated by an outside arbitrator. Bennun thereafter instituted a civil action in New Jersey Chancery Division. Judge David Landau found that the Grievance Committee lacked authority to make such a recommendation and ordered that a remanded evaluation be conducted. The remanded evaluation occurred in 1984-1985.

Rutgers' promotion procedures are set forth in University

Regulations issued by the Board of Governors.² Promotion and evaluation procedures are established annually by the Executive Vice President and academic officer. A promotion candidate's "promotion packet" consists of a statement of the candidate's qualifications set forth on a form, outside confidential letters of evaluation and evaluation forms added at each succeeding level of evaluation. The candidate's promotion packet is first evaluated by the tenured faculty in his or her department who are at or above the rank for which the candidate is being considered. Starting in academic year 1983-1984, there was a separate evaluation by the department chair.

Separate copies of the promotion packet, containing the statement of qualifications, outside letters and department and chair evaluations, go to the academic unit's Appointment and Promotion Committee ("A&P") and the appropriate section. The Appointment and Promotions Committee consists of four faculty members, two of whom are elected by the faculty and two of whom are appointed by the Dean. The Committee is advisory to the Dean. It evaluates the candidate on the basis of the promotion packet.

The section is a University-wide group of all faculty members in a discipline. Prior to March 1989, the section evaluated candidates for promotion. The promotion packet reviewed by the section contains the statement of qualifications, the department evaluation and the outside letters. It does not contain the A&P Committee or the Dean evaluations. The section's evaluation is limited to research and scholarly activity.

2. The parties stipulated to the following discussion of Rutgers promotion procedure.

The Dean conducts a separate evaluation. The promotion packet he reviews contains the statement of qualifications, department and A&P evaluations and the outside letters. The Dean does not have the Section evaluation.

The function of the Promotion Review Committee ("PRC") is to advise the President on promotions within the tenured ranks. Its membership consists of the three campus provosts and four senior faculty members who are appointed by the President. The PRC Committee is chaired by the Executive Vice President and Chief Academic Officer who serves without vote. The PRC reviews the full promotion packet, including all previous evaluations, and makes a recommendation to the President.

The promotion procedure for any particular year and the role of each valuative body is set forth annually by the Executive Vice President and Chief Academic Officer in Academic Reappointment/Promotion Instructions. These instructions contain the promotion schedule, the forms to be used in the process, and explanation of the responsibilities of the candidate and each valuative body, information regarding outside letters and information concerning the materials and standards to be used in the promotion process.

The first issue before the Court concerns whether plaintiff has stated a cognizable claim for relief under § 1981.³ In *Patterson*

3. This section provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

v. Mclean Credit Union, 491 U.S. ____, 105 L.Ed. 2d. 132 (1989), the Supreme Court dramatically limited the scope of § 1981 holding it inapplicable to a vast array of post contract discriminatory practices. Nevertheless, the Court left open the possibility that certain discriminatory promotion claims would still be actionable under § 1981. The Court wrote:

The question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. . . . Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981. *Cf. Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (refusal of law firm to accept associate into partnership).

The dispositive inquiry is, therefore, whether promotion from associate professor to full professor would have created a new and distinct contractual relation between Bennun and Rutgers. The Court finds that it would have for a variety of reasons.

First, there are significant and substantial differences between the associate and full professor in terms of prestige and perception. Within the academic community the unqualified title of professor is one of the ultimate goals of the academician. The professor may at times publish in the same journals and perhaps teach the same courses as an associate professor but, like the partner in a law firm, the full professor is regarded with a greater degree

of respect and deference than is the associate professor. His academic opinion and judgment is simply accorded more weight than the associate. This difference is also manifest in the lay community where the title professor, like the title "Doctor" or "Counselor", is one of reverence and respect. It is a title far more significant than associate professor or associate lawyer. Differences in terms of perception and prestige are directly relevant to a § 1981 inquiry.

There are also significant differences in terms of function between the associate and full professor. The professor participates to a greater extent in University governance and can, if so qualified, advance on the ladder of academic achievement. At Rutgers, the professor can serve on the PRC, the A&P committee and can also review associate professors within the individuals own department for promotion. The full professor is, therefore, a full partner and participant in University governance. The associate professor is, as the title suggests, a junior participant in all aspects of University life. He cannot participate in the higher review committees which, as is amply manifest in this litigation, exercise great power over the future of the University. These differences clearly indicate that the professor has a new and distinct contractual relation with his employer. Like the associate elevated to the status of partner, the professor becomes a participant in the management of the organization.

Two other points illustrate the significant contractual differences between the two positions. First, Rutgers has created an elaborate promotion procedure which is designed to insure that only the most qualified individuals are elevated to exalted rank of professor. The Court recognizes that the process created to separate two positions should not be the determinative factor in the § 1981 analysis. Yet the process surely bespeaks something of the difference and the value placed by the university on the

position this process is created to serve. The testimony establishes that the process did not exist, in a vacuum, to serve itself. Rather, it indicates that the process was so elaborate because the University placed such significance on the title and promotion. University Policy simply states that "A full professorship is the highest academic rank."

It is also true that an individual who is perennially rejected for promotion to full professor exists in a strange limbo where, like the permanent law associate, he may have a degree of monetary satisfaction but is never professionally fulfilled. Both individuals are hampered by the same stigma. One never made "partner" and the other never made "professor". This stigma hampers each individual professionally and personally. Both individuals will never have the personal satisfaction of knowing what goes on behind the closed doors of the partners and professor meetings. It may be true that nothing at all of interest to them or the world at large goes on behind those doors. But what is important is that the individuals behind the doors zealously guard the portals and create elaborate procedures to maintain the appearance, if not the reality, of the significance of the advancement and world beyond the threshold. The Court cannot ignore the significance of this fact and therefore finds that there are objective and intangible differences between an associate professor and full professor such that promotion would constitute a new and distinct contractual relation between the employer and employee within the ambit of § 1981.

To prevail on a claim of disparate treatment under Title VII or § 1981 a plaintiff must demonstrate purposeful discrimination. *See Patterson v. Mclean Credit Union*, 109 S.Ct. 2363, 2377 (1989). To facilitate the often difficult task of proving discrimination by direct evidence, the Supreme Court has established a framework

of shifting burdens of proof. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Under this framework, the plaintiff has the initial burden of proving a *prima facie* case by a preponderance of the evidence, which, if successful, raises the inference of unlawful discrimination. *Burdine*, 450 U.S. at 250-252.

The burden of establishing a *prima facie* case is not difficult.⁴ The plaintiff must show that he is a member of a racial minority, qualified for the job from which he was discharged, and that others not in the protected class were treated more favorably. See *Hankins v. Temple University*, 829 F.2d 437, 440 (3d Cir. 1987). After establishing a *prima facie* case the burden of production shifts to the defendant to clearly set forth the legitimate, nondiscriminatory reason for the discharge. *Burdine*, 450 U.S. at 255. If the defendant meets this burden the inference of discrimination created by the *prima facie* case is eliminated and the burden shifts back to the plaintiff who must prove by a preponderance of the evidence that the reasons asserted by the defendant were a pretext for discrimination. *Id.* at 253. The plaintiff may meet this burden either directly, by showing that a discriminatory reason more likely motivated the employer, or

4. See *Roebuck v. Drexel University*, 852 F.2d 715, 726 (3d Cir. 1988). In the context of a failure to grant tenure the court wrote that the plaintiff "need only show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body."

indirectly, by showing that the asserted reason is unworthy of credence. *Id.* at 256.

Plaintiff bares the ultimate burden of proof and he must therefore establish that "his status as a minority class was the but for reason for the treatment accorded." *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) (citing *Lewis v. University of Pittsburgh*, 725 F.2d 910, 921 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984); *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984)). See *Price Waterhouse v. Hopkins*, 104 L.Ed 2d 268 (1989) ("The critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made.") (Brennan, Plurality Opinion, " . . . our specific references to gender throughout this Opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.")). This test does not require the plaintiff to establish "that the discriminatory reason was *the* determinative factor, but only that it was *a* determinative factor." *Id.* (citing *Smithers v. Bailer*, 629 F.2d 892, 898 (3d Cir. 1980)). It recognizes that "more than one 'but for' cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated." *Id.* (citing *Lewis*, 725 F.2d at 917 n.8.).

The requirements of a discriminatory retaliation claim are similar to a disparate treatment case. The plaintiff must first establish a *prima facie* case before the burden of production shifts to the Defendant. *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982). To establish a *prima facie* case of retaliation the plaintiff must demonstrate: (1) that he/she engaged in statutorily protected activity; (2) that he suffered an adverse employment

action; and (3) that a causal link exists between the protected activity and the discharge. *Jalil v. Advel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 725 (1990) (citing *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988), *cert. denied sub nom, Jordan v. Hodel*, 109 S.Ct. 786 (1989)). The causal "connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Burrus*, 683 F.2d at 343.

Plaintiff concedes that there is no direct, smoking gun evidence indicating that Bennun was denied promotion because of his Hispanic origin. Rather, plaintiff relies on a comparative analysis of Dr. Bennun and various other individuals promoted during the relevant time period. Rutgers rigorously argues that comparative analysis can only be used when there is only one distinguishing feature between the plaintiff and the comparative group (*i.e.*, national origin). This position is unpersuasive for a variety of reasons.

First, the Third Circuit has consistently endorsed the use of such comparisons in a disparate treatment case. See *E.E.O.C. v. Franklin & Marshall College*, 775 F.2d 110, 116 (3d Cir. 1985) (citing, *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1240 (7th Cir. 1985), *cert. denied*, 474 U.S. 1001 (1986)); *Kunda v. Muhlenberg College*, 621 F.2d 532, 538 (3d Cir. 1980) (" . . . consideration of the practices of the college toward the plaintiff must be evaluated in light of its practices toward the allegedly more favored group . . . "). Moreover, defendant's argument is logically flawed in that it would be the rare to non-existent case where there would be *only one* difference between the plaintiff and the comparative group. The Court readily accepts the argument that for the

comparison to meaningful the individuals must be similarly situated. This principle cannot, however, be extended to the absurd length urged by defendant. Universities are not beyond the purview of Title VII. As such, comparative analysis must be used to determine if the admittedly subjective and "arcane" determinations governing promotion were not used as a "mechanism to obscure discrimination. . . ." *Kunda*, 621 F.2d at 548; *see, Namenwirth*, 769 F.2d at 1240 ("To prove the proffered motive is not worthy of belief, evidence of a comparative sort is appropriate: if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is 'pretext.' "). That is, the comparison must be used to determine if the promotion criteria were applied uniformly.

Finally, Rutgers' promotion policy implicitly, if not explicitly, endorses the use of comparative analysis in the promotion process. The policy provides that "By this process, it is hoped that all significant information with respect to the services and accomplishments faculty members are rendering within their department, within their college, within their scholarly field, and within the University will be brought out and compared with the services and accomplishments of other colleagues having the same or similar duties." This language suggests that comparative analysis is similarly appropriate in a Title VII case.

The Court will first analyze the issue of plaintiff's *prima facie* case of retaliation. Plaintiff has clearly met the initial burden of proof by demonstrating that he engaged in various statutorily protected activities designed to vindicate perceived civil rights violations. Bennun was also subject to adverse employment action. He was not promoted. The more difficult issue concerns the causal link between the two events.

Plaintiff urges the Court to infer retaliatory animus on the basis of two pieces of evidence. First, Bennun's testimony that prior to an EEOC meeting a University representative, Alice Evangelidis, told Bennun that "he should never have been granted tenure in the first place." Bennun also relies on the 1984 EEOC finding that "there is reasonable cause to believe" that Bennun was retaliated against for filing EEOC actions. The EEOC reached this conclusion by comparing Bennun's qualifications with those of Dr. Somberg. The Court finds that this proof is insufficient.

First, while the statements of Evangelidis evidence a certain hostility toward Bennun, there is no evidence indicating that such hostility related to Bennun's litigious past and more importantly, manifested itself in adverse employment action. Significantly, Evangelidis played no role in the various promotion decisions attacked by Bennun. Her statement simply cannot be imputed to the entire University to infer retaliatory animus.

Finally, the EEOC probable cause finding, while relevant to Bennun's claim of discriminatory treatment, does not identify any facts which would justify an inference of retaliation. Plaintiff presented no testimony concerning the timing of the various adverse employment actions such that the Court could infer a retaliatory animus. See *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). Judgment is thus GRANTED for the defendant on plaintiff's retaliation claim.

The Court next addresses the issue of plaintiff's *prima facie* case of disparate treatment. Plaintiff is Hispanic and thus satisfies

the first prong of the *prima facie* case.⁵ In order to address the second and third prongs of the test it is necessary to examine Bennun's promotion packets and those of similarly situated individuals who were promoted.⁶ The Court will focus particular attention on the promotion packet of Dr. Ethel Somberg who practiced in the same discipline as Dr. Bennun.

Promotion decisions at Rutgers, as stated, are made on the basis of five principal promotion criteria. They are teaching effectiveness, scholarly/creative activity, research accomplishments, professional activity and general usefulness. An individual promoted to full professor "should have met with distinction one or more of the criteria . . . and have made substantial progress beyond that for which he or she was recognized at the associate professor level." The most heavily weighed criteria are research accomplishment, scholarly activity, and teaching effectiveness. When reviewing a candidate the PRC relied heavily on the section and department to evaluate the candidate's research credentials.

University policy does not explicitly detail how peer review letters are to be considered. The testimony indicates that the weight attached to the letter depends on a variety of factors including

5. The court previously adjudicated this issue. *Bennun v. Rutgers*, Civ. Ac. No. 84-4655A (April 14, 1988) (Opinion and Order).

6. The University's reasoning with reference to qualification is circular. Rutgers asserts that "the University's evaluation procedure determines whether a candidate is qualified for promotion and tenure." They thus posit that because Bennun was not promoted he was not qualified and therefore, by extension, can not meet the requirements of the *prima facie* case. If accepted this position would effectively shield Universities from scrutiny in that anyone denied promotion could never establish a *prima facie* case.

the fame of the author and his/her department, the level of specificity in the letter and whether the evaluator was suggested by the candidate. Letters from individuals suggested by the candidate are labelled "A" letters while letters solicited by the department are labelled "B" letters. The evaluators, generally, consider the "B" letter more significant. This is not a hard and fast rule and would again depend on the level of specificity and author of the "B" letter in comparison to the specificity and fame of the author of the "A" letter.

Bennun was first considered for full professor in 1978-1979. The department voted 3-2-1 to promote. The college dean concurred. The A&P committee voted 0-4 not to promote. The section similarly voted 2-6-1 not to promote. The department rated Bennun outstanding in scholarly/creative activity and research accomplishments. He was rated average to below average in teaching effectiveness and general usefulness. He was rated above average in professional activity.

The A&P rated Bennun above average in scholarly creative activity and research accomplishments. He was rated below average to average in teaching effectiveness and general usefulness. On Bennun's research, the committee commented that "Although he has made numerous contributions to conferences and symposia, Dr. Bennun has published his work in refereed, full length papers only at a modest rate." Concerning Bennun's professional activity, the committee noted that Bennun was "extraordinarily" active in his field and had brought "considerable" attention to the Newark College of Arts and Sciences. Concerning Bennun's scholarly activity, the committee opined that Bennun was "moderately active in his area of research and has produced results which have drawn favorable comment."

The Dean rated Bennun above average to outstanding in scholarly, research and professional activity. He rated him average to below average in teaching and general usefulness. The Dean noted that their "continues to be a question" about his research. He also noted that Bennun "is obviously intensely committed to research; he is very serious about his scholarly work and is deeply involved in scholarly activities of importance." The promotion review succinctly stated that it "finds insufficient evidence of distinction in teaching and scholarly work to warrant promotion at this time."

Bennun's *curriculum vitae* showed that he published 20 refereed articles appearing in significant scientific journals.⁷ He published eight of these articles after he received tenure in 1972. Bennun also published, between 1969 and 1978, 21 abstracts and communications. Seventeen abstracts were published between 1972 and 1978. He gave 21 invited lectures between 1969-1978, thirteen between 1972 and 1978. He presented papers at 18 professional meetings between 1972-1978 and 22 between 1968 and 1978. His resume also reflects continued grant support and a wide variety of teaching responsibilities. For example, Bennun taught Seminars in Zoology, Courses in experimental biochemistry, physiological zoology, general biology, metabolic pathways (control), metabolic pathways (mechanisms), Advanced Endocrinology, Research in Zoology, Special Topics in Biochemistry and Advanced Studies in Biochemistry.

Bennun's peer review letters are significant in that they came from internationally recognized leaders in the biochemistry field

7. Bennun's published in Nature New Biology, Biosystems, Molecular and Cellular Biology and The Biochemical Journal.

including Alfred Lehninger, Ephraim Racker, David Sabatini and a renowned french researcher "de la LLOSA."⁸ Lehninger noted that while Bennun's work was not specifically in his field it "Looks to be interesting and novel" and supported by good experiments. He stated that Bennun's published output was "considerable and some of it quite interesting." He concluded that it was too early to determine whether the underlying theories "are valid" and recommended that the University contact Racker who had more expertise in Bennun's specific area of research.

Racker wholeheartedly supported Bennun for promotion. He wrote that "recent work on the effect of non-adrenaline on brain adenylate cyclase represents a significant contribution to this important field." Similarly, Sabatini, Chair of the Department of Cell Biology at NYU Medical Center, stated that Bennun was "well deserving promotion" based upon his "original scientific work" Finally, de la LOSA noted that Bennun's research work on adenylate cyclase was "remarkable."

Bennun was again considered for promotion in 1980-1981. His *curriculum vitae* showed in addition to the information on the 1978-1979 curriculum, a work being readied for publication, an additional published abstract, four additional invited lectures, an additional presentation to the American Society of Zoology, and additional grants. The department again recommended, 5-0-1, that he be promoted. They rated Bennun outstanding in research and scholarly activity, above average in professional activity and average in teaching effectiveness. He was rated average to above average in general usefulness. The department wrote that "Bennun

8. Racker, Sabatini and "de La LLosa" were all "A" references suggested by the candidate. Lehninger was a "B" solicited by the University.

is obviously a biochemist of some stature who is concerned with applying his knowledge His research activity at Rutgers has been considerable and widely known. Much of it is in highly controversial areas where competitive and divergent theories exist. However, the supportive statements of three outside referees including two internationally famous members of the National Academy and a Past President of the American Society for Cell Biology cannot be ignored."

The A&P committee voted 4-0 not to promote rating Bennun average in all categories except professional activity which they rated him above average. The committee commented that it was "puzzled by the apparent lack of outside grant funding" for Dr. Bennun. The committee also noted that "Dr. Bennun's accomplishments are insufficiently acknowledged or evaluated by colleagues outside Rutgers to warrant promotion at this time." Concerning his research they "raised questions about: (1) the number of such publications since his coming to Rutgers; (2) The apparent lack of experimental follow-up to his theoretical papers; and (3) The *apparent unwillingness of outside evaluators* to commit themselves to detailed and informative judgment." (Emphasis added).

Stan Hall, the chair of the A&P committee, testified that the absence of current letters was a problem; unique to Bennun's file which made it "impossible to make a valid appraisal because there were not sufficient letters." More importantly, Hall concluded that Bennun's Department was withholding a negative letter it had received in 1978-1979. He stated that "Obviously there must have been a damning letter there, so the department did not wish to submit one of those letters. . . ."

The Dean recommended promotion praising Bennun's

research particularly in light of the limited research space at the Newark campus. The Dean also noted that his work "has been very favorably evaluated in the past by *prominent* and *highly respected* biochemists." (Emphasis added.) The section recommended against promotion 6-2-4 commenting that "additional evidence of a strong research program is needed. Even though the scholarship may be substantial in some of his publications, the total output is insufficient to support promotion to full Professor at this time." The PRC concurred in this assessment and recommended against promotion.

A similar pattern occurred in 1983-1984. The department recommended 5-0 to promote noting that Bennun was a "biochemist of some stature" with the continued support of three internationally famous outside referees. The department chair recommended against promotion without evaluating Bennun's scientific work. Rather, he took discernible umbrage at what he characterized as Bennun's attempts to bypass the chair when determining his teaching assignments. The A&P committee again recommended against promotion voting 1-2-1. The committee noted that it "does not feel that the candidate's performance at all levels warrants promotion." The Dean concurred stating that "The candidate is a research active scientist whose overall record is not sufficient to carry a recommendation for promotion to full professor."

The section voted 7-2 to promote. They commented that "Bennun is worthy of promotion on the basis of his research output and the training of graduate students . . . His expertise has been recognized by his appointment to two editorial boards." It was also noted that Bennun spearheaded an effort to attract funding for minorities in the biochemical field on the Newark campus.

Bennun's 1983 file included five "B" letters and two "A's." Included in the "B's" were letters from Dr. Caesar Milstein an "eminent British biochemist" and Dr. Andre T. Jagendorf, an "outstanding biochemist." Among the "A's" was a new letter from the famous Racker. Although Racker was still supportive he negatively commented on Bennun's productivity. He wrote "I am endorsing the promotion of Dr. Alfred Bennun although I must confess that I am very disappointed by his productivity. I don't believe he is fully using his natural talents." Milstein wrote favorably of Bennun stating that he "certainly deserves support" Eliot M. Ross, from the University of Texas, recommended against promotion. Jagendorf wrote that he could not comment because Bennun's work was outside his field. Gunter Zweig from the University of California judged Bennun "most eligible" for promotion. Similarly, Dr. Martin Blank from Columbia "strongly" supported Bennun's promotion. He wrote that Bennun's ideas were innovative and that he had achieved senior status in his discipline.

It is clear from this discussion that plaintiff has satisfied the burden of establishing that he was qualified for promotion. While the Court notes the caveat that "the oft times difficult decision to promote or to grant tenure shall be left exclusively to this nations colleges" *E.E.O.C.*, 775 F.2d at 117, it is also equally true that "academic institutions and decisions are not *ipso facto* entitled to special treatment under federal laws prohibiting discrimination." *Kunda*, 621 F.2d at 545. The objective data on Bennun's *curriculum vitae* and the opinions of internationally renowned biochemists clearly demonstrate that Bennun was at

9. The court notes that while Racker comments negatively, this letter is also a significant endorsement of Bennun's talents particularly considering the fame and renown of the author.

the very least qualified for promotion to full professor. The more difficult issue concerns whether Bennun has satisfied the third prong of the *prima facie* case by demonstrating that other individuals, not in the protected class, were treated more favorably. To resolve this issue it is necessary to further examine Bennun's record with that of Dr. Somberg and, more importantly, the standards that were used to analyze Dr. Somberg's qualifications.

Ethel Somberg was associate professor of biochemistry in the Zoology and Physiology Department. She was considered and promoted to full professor in 1979. The department voted 5-0 to promote. The dean concurred. The A&P committee voted 4-0 to promote. The section voted 6-2-1 to promote. The department rated Somberg outstanding in teaching, scholarly activity and general usefulness. She was rated above average in research and professional activity. The Department noted that "considering her teaching responsibilities" she had a "commendable level of research activity."

The A&P committee rated Somberg outstanding in teaching, scholarly/creative activity and general usefulness. She was rated above average in professional activity and above average to average in research accomplishments. The committee noted that "Dr. Somberg's scholarly work both in terms of the extent of present and continuing activities and of the quality evident in the published work appears excellent." Concerning research the committee noted that "comments of the letters of recommendation and the evaluation of her colleagues suggest that Dr. Somberg's research accomplishments are above average in quantity and of very high quality."

The Dean rated Somberg outstanding in general usefulness above average to outstanding in teaching, about average in

scholarly, average to above average in research and average in professional activity. The Dean wrote that the "quality and continuity of the work is substantial in light of her many teaching and advising duties." Concerning research the dean wrote "While a few of the letters of evaluation are rather old, and the new letters speak of her overall role, it is nonetheless clear that she does work of quality and it is important to note that the output has increased of late."

The section noted "recent publications as evidence of continuing research activity and therefore recommends promotion to full prof." Somberg's *vitae* listed 17 total publications, including abstracts, between 1965 and 1978, thirteen between 1969 and 1978. Of these articles six were in refereed journals, three of which were published since her last promotion. It also referenced works in progress which had not been published or accepted for publication. It showed service on one editorial board, no invited presentations at symposia or seminars and one grant. The *curriculum vitae* did not specifically reference her teaching responsibilities. Form 2a, however, used by the department to rate Somberg, indicates that she taught elementary biochemistry, general biochemistry, molecular and cellular biology and nucleic acids. Somberg's promotion packet included only five letters, three A's and two B's. There were no positive letters, either A's or B's, from a well known scientist or researcher. Two of the A letters were from previous colleagues.¹⁰

This analysis clearly establishes that Bennun has satisfied the third prong of the *prima facie* case. Objectively, the University

10. A number of Bennun's positive letters were also from individuals suggested by Bennun. The significant difference is that these letters came from internationally famous scientists.

applied a different standard to Dr. Somberg than it did to Bennun. In 1978 the A&P committee unanimously recommended that Somberg be promoted. The committee found Somberg's published work, "both in terms of extent" and "quality" excellent. The committee similarly found Somberg's research "above average in *quantity* and of very high quality." Somberg's promotion packet, however, revealed only three publications in refereed journals, no grants, no invited presentations and four works in progress. Somberg was also not a member of the prestigious Federation of American Society of Experimental Biologists as was Bennun. Bennun's 1981 packet revealed 13 articles in refereed journals between 1969 and 1981, 22 published abstracts, 22 presentations, service on two editorial boards and grants from the public and private sector. Concerning this record the same A&P committee wrote that Bennun has published "only at a modest rate" and was only "moderately active in his area of research" The Court does not quarrel with the University's proposition that when evaluating a candidate quality as well as quantity should be considered. However, the evaluators themselves focused on quantity when considering both Somberg and Bennun. Bennun, whose quantity was clearly superior to Somberg was rated "moderate" while Somberg was considered "excellent." There was, therefore, shifting criteria applied concerning a candidates rate of publication.

The University argued that this disparity could be explained because Somberg had shown an increase in productivity on the

11. Dr. Jordan, Chair of the Department of Chemistry and member of the A&P committee in 1981-1982 testified that the committee's negative recommendation was "based on the reading of the committee as to where the publications appeared, whether they were refereed journals or unrefereed journals. Third, the lack of external funding which was lacking."

"eve of a promotion evaluation." Plaintiff accurately notes that this was an erroneous and more favorable standard. University guidelines required that the various promotion committee's consider the candidates productivity since the last promotion. Again, Somberg was treated more favorably than Bennun. The disparate standard applied to Bennun is also evidenced in the trial testimony of Dr. Young who served as provost during Bennun's 1980-81 evaluation and directly participated in the PRC's review of Bennun's file.

Young testified that to be promoted to full professor the University "expects that sort of . . . would have become an influential investigator on the national and international scene." Nevertheless, with reference to Somberg, Young stated that she had an "impressive number of publications" and was "very intellectually alive and very up with her field." There was no indication that she had an impact on the discipline or was an "influential investigator on the national or international scene." Dr. Pond, general deputy to the president and chief operating officer of the University, similarly testified that to be promoted to full professor the candidate should be "maturing as a scholar" and his/her work should have "impact . . . on the discipline at large and level of recognition." Again, Somberg's record is deficient when measured against this standard. The disparate standard applied to Bennun is also evidenced by Young's testimony concerning grant support. He stated relative to Somberg's lack of grant support that "I don't know that she did or she didn't. It was not relevant to the judgment we were making on Ethel Somberg." In 1981 the A&P committee noted that it was puzzled by Bennun's lack of funding. Although Bennun had many more grants than Somberg, no similar comment was made with reference to her file.

Similarly, Bennun, who had continued support of internationally famous scientists, was found inadequate because the biochemistry community allegedly showed little interest in or willingness to comment on his work.¹² There was no similar requirement placed on Dr. Somberg who did not have the support of any internationally recognized scientist. It is also important to note that when the dean evaluated Somberg he noticed that many of her letters were old. He did not infer from this fact that there was a lack of interest in her work or, more importantly, that a damning letter was being withheld. When evaluating Bennun's packet the A&P committee inferred both conclusions although that packet, as stated, was objectively stronger than Somberg's in that it contained more letters from significant scholars in the Biochemistry field.

The disparate standard is also evidenced in the deans evaluation of Somberg's research. He wrote that Somberg's scholarly and creative activity was substantial in "light" of her many teaching responsibilities. Rutgers posited that "the question with which her evaluators were presented concerning her research accomplishments was whether her record in that area was so inadequate as to preclude promotion." With reference to Bennun, the University postulated that "the question presented to Bennun's evaluators was, given plaintiff's mediocre achievements across all the other criteria, whether his research accomplishments rose to a level of sufficient distinction to overcome his unimpressive performance across the other criteria."

12. Stan Hall testified as follows: Q: You concluded that peers in his field did not think enough of Dr. Bennun to take a half-hour to write a letter for him. Is that correct? A: That's Correct.

There are three significant problems with this formulation. First, it completely contradicts the University promotion policy which states that an individual "should have met with distinction *one* or more of the criteria" ¹³ Second, the University evaluators *did not* recommend against promotion because of Bennun's alleged "mediocre" teaching. Rather, the record clearly reflects that Bennun was denied promotion because of perceived inadequacies in his research program. The record also reflects that various evaluations of Bennun's teaching were very similar to evaluations of Somberg's. ¹⁴ Finally, and perhaps most

13. As stated the most heavily weighted criteria were research, scholarly activity and teaching effectiveness. It should also be noted that the University promotion policy provides that an individual should be judged in his chosen area of expertise: "It is important that once it has been decided what a particular individual's area of responsibility is to be, he or she be judged with respect to the duties assigned. Thus persons who are primarily teachers should be judged as teachers; persons who are primarily research scholars would be judged as research scholars" The University's formulation subjects Dr. Bennun to a disparate standard in that it required him to excel in all five promotion criteria.

14. For example, in 1979 James Hall, Professor of Physiology, in a peer review wrote that "The oral presentation was clear and understandable At several points he checked with the class to find out if they understood a particularly involved concept, and in a couple of cases went over it again It was clear that Dr. Bennun was in command of the subject and found the topic interesting, even exciting, but he was not too successful in projecting this enthusiasm to his audience. However, the presentation was well organized, clear and factual. The class was attentive and responsive."

In 1978 Dr. Hall wrote of Somberg that "lectures are clear, well organized, logically developed Students interested, attentive and inquisitive. Care is taken to ensure that difficult concepts are understood. Student questions are answered thoroughly and student participation is encouraged." The court does not readily discern the significant differences between these assessments. In fact, objective analysis supports the proposition that there are no real differences.

importantly, the objective record simply does not support the University's contention that Bennun was mediocre in all areas besides research.

For example, Dr. Young testified that Somberg taught a broader array of courses than Bennun. Her *curriculum: vitae* shows that while in the department she taught seven different courses from Elementary Biochemistry to General Biochemistry. Bennun taught twelve courses from Advanced Endocrinology to General Physiology. Bennun's record of professional activity also exceeded Somberg's. In fact, the A&P committee recognized in 1978 that he was "extraordinarily active professionally . . . and has thereby brought considerable attention to the Newark College of Arts and Sciences." The record, therefore, clearly demonstrates that a shifting disparate standard was applied to evaluate the qualifications of Drs. Bennun and Somberg. The burden of production then shifted to Rutgers to articulate a legitimate nondiscriminatory reason for its action.

Defendant relied on the reasons articulated in Bennun's promotion packets and on the testimony of individuals who participated on the reviews. In the judgment of the A&P committee in 1981, Bennun's "accomplishments are insufficiently acknowledged or evaluated by colleagues outside Rutgers to warrant promotion at this time." The section stated: Additional evidence of a *strong research* program is needed. Even though the scholarship may be substantial in some of his publications, the total output is insufficient to support promotion to full professor at this time." The PRC similarly focused on Bennun's research. They wrote, "The record indicates that he has not established a scholarly and research production to reach the level required for the rank of Professor."

In 1982 the A&P again wrote that "The work which Dr. Bennun has produced is not quantitatively or qualitatively at the level which we expect for a full Professor at a major university." The PRC considered Bennun's letters badly mixed and, in its recommendation to the President, wrote "the record does not document the research accomplishments necessary to warrant this promotion."

In 1984 the A&P committee again wrote that "... there was insufficient evidence of distinction, specially in research accomplishments, to merit promotion to full professor." The Dean concurred, writing: (1) The candidate pursues a reasonably active program of research that is not characterized by great originality or much impact on the profession; (2) The overall quantity and quality of the candidates record of publication is rather less than might be expected in PhD granting department; and (3) The overall record of Dr. Bennun is not sufficient to carry a recommendation for promotion."

The PRC wrote, in part, that "The assessments by the candidates internal and external peers of his accomplishments in research since he was awarded tenure do not sufficiently reflect the recognition for original contributions to the discipline and leadership in its development which is necessary to justify this promotion." The University therefore proffered a legitimate nondiscriminatory reason for denying Bennun promotion: his research was considered uncreative, moderate in quantity and insufficiently recognized in his field. Plaintiff thereafter had to establish by a preponderance of the evidence that this proffered reason was pretextual.

Pretext may be demonstrated either directly "or indirectly by showing that the employer's proffered explanation is unworthy

of credence." *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-805). Plaintiff's proof again focused on comparative analysis, similar to that used to establish his *prima facie* case, to demonstrate that Rutgers' proffered reason is not worthy of credence. Although the University strongly urged throughout the litigation that plaintiff's comparative analysis was flawed, particularly because it focused almost exclusively on research accomplishments, plaintiff focused on this area not because the other areas were insignificant, but rather, because defendant's proffered reason for denying promotion was Bennun's research. The Court's analysis must also focus on this area to determine if it is worthy of credence or was a pretext used to mask an impermissible discriminatory criteria.

When evaluating a candidate's research the university focuses on peer review letters, productivity as measured by publications, research support, service on editorial boards and invitations to conferences. The Court will first focus on the peer review letters of Dr. Bennun and Dr. Somberg.

Dr. Young testified that Bennun's letters did not explain the extent to which his work impacted his discipline. A brief review of these letters belies this claim. As previously indicated Bennun's letters, to a great majority, came from individuals at the "top of their field." A number of these letters directly reference Bennun's impact on his field. For instance, Lehninger's letter references both Bennun's work in energy transduction and adenylate cyclase. Garlid also specifically comments on Bennun's work on modulators of adenylate cyclase. Racker wrote that Bennun's work in this area "represents a significant contribution to this important field." Sabatini's letter was likewise specific in its praise. He wrote "I am particularly impressed by his discovery of interesting in vitro effects of ions and hormones on the enzyme activity, which probably will shed light on the

mechanism of feedback regulation." Finally, P. de la LLOSA simply said that Bennun's work on adenylate cyclase was "remarkable."

As stated, Dr. Somberg's letters did not come from renowned scientists. More importantly for this inquiry, they do not in any way indicate how her work impacted her field. Shapiro, a former student, writes that her papers "will be a most useful source of information for current and future investigators." Mehlman, another friend, does not comment on Somberg's research at all. Rather, the letter focuses on her teaching and contributions to the school at large. Harris, an associate of Somberg's for seventeen years, is more specific but no more so than Bennun's reviewers. Simmons, from Upsala College, offers no substantive comment concerning the impact of Somberg's work on her field. This analysis reveals, beyond any doubt, that the articulated reason for Bennun's rejection is merely a play on words without any basis in fact.

Review of the peer review letters of other individuals promoted during the same period reveals similar inconsistencies in the University's evaluation of Bennun. Robert Herman, a professor in the zoology section, was considered and promoted to full professor in 1981. Herman's packet is relevant to this analysis because the packet contained no "B" letters. The three reviewers were all "A's" suggested by the candidate. This deficiency did not affect his candidacy.

Similarly, Ronald Rockmore, a physicist, was promoted to full professor in 1979 despite peer review letters which clearly did not indicate that Rockmore was an influential investigator or had contributed significantly to his field. Kerman, from MIT, wrote that he "was not a leading light in his field." Similarly,

Greenberg wrote that he did not recognize that his articles had made a "significant contribution to this field." Rosner and Weinberg both declined to offer substantive comment. Amado indicated that Rockmore's work was first class but not up to international standards. ("It is true that he has chose to devote a good deal of his effort to particle theory and that the international standards there are very high. If you insist upon measuring him against Gell-Mann you will find him not quite up to it!")

The Court does not conclude or infer that any of these individuals did not deserve to be promoted. Rather, they are used merely to illustrate that the reasons articulated by the University concerning Bennun are simply not believable. Plaintiff has, therefore, demonstrated by a preponderance of the evidence that the University's proffered, non-discriminatory reason was not worthy of credence. In summary, plaintiff has satisfied the requirements of a *prima facie* case and demonstrated pretext by the following:

1. A different standard was applied to Bennun in terms of number of publications. (Bennun with more publications was moderately active while Somberg was excellent in quantity.)

2. A different standard was applied to Bennun concerning what level of achievement was necessary to be promoted. (Bennun was required to become an international leader while other promoted candidates, whose letters indicated they were not international leaders, were promoted.)

3. A different standard was applied concerning grant support. (For Bennun this was a negative factor, for Somberg it was not relevant)

4. A different standard was applied concerning the level of specificity required by peer reviewers. (Bennun's were not specific while other promoted candidates had none.)

5. A different standard was applied concerning the age of the peer review letters. (Bennun's were old and therefore negative. Somberg's, although just as old were not considered dispositive.)

6. A different standard was applied concerning the number of peer review letters. (The University inferred a lack of interest in Bennun but not in others who did not have the continued support evidenced in Bennun's packet.)

7. The A&P committee *sua sponte* concluded, without any evidence, that a damning letter was being withheld from Bennun's packet. No such inference was drawn with reference to other candidates with similar or less substantial peer review packets.

8. Somberg's research was considered in light of her teaching. Bennun who taught a similar load was not so evaluated.

9. The University's explanation that Bennun's research was inadequate is not worthy of credence in light of a comparative analysis with other promoted candidates whose research qualifications were judged excellent.

The Court recognizes that it should not act as a super promotion committee and that the University will surely contend that it did just that. The Court also recognizes that academic decisions, subjective and based on arcane areas of science beyond the immediate expertise of the Court, should be left to the individuals best suited by position and education to make such assessments. But, it is equally true that civil rights laws apply

to Universities. Academic freedom does not translate into freedom to act beyond the scrutiny of the law. This Court has no hesitancy in applying those laws, within the framework established by the Supreme Court, to academic institutions. In this case, the record dramatically demonstrates that a shifting standard was applied to the plaintiff. There is no smoking gun, there is no racist statement of Hispanic bias. Nevertheless, close scrutiny of defendant's proffered reasons for rejecting Bennun is compelling. This Court finds discrimination.

There may well have been some other reason for the University's action distinct from a racial animus. That reason was not articulated. The one that was does not withstand scrutiny. Something was wrong in Denmark. This Court must right that wrong. To remain free from such scrutiny or "interference" Universities need only follow the simple caveat that standards governing subjective determinations should be applied evenly. The law requires only that much. If done so a Court could not "second guess" the University. Judgment is thus entered for plaintiff on his disparate treatment claim.

On the issue of damages the Court finds that Bennun did not credibly establish emotional or mental harm. No compensatory or other relief available under § 1981 is, therefore, awarded. Plaintiff has proved his Title VII case and equity mandates that he be retroactively promoted to full professor with full back pay from the 1980-1981 review. *See Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971). The Court does not consider that this remedy would cause increased tension or animosity between Bennun and the University. Bennun is already tenured and has consistently demonstrated his tenacity and ability to overcome tension filled work environments. As such, there are no countervailing considerations weighing against

retroactive promotion. In fact, retroactive promotion is the only viable remedy available to place defendant in the position he would have been absent discrimination. Defendant is further enjoined from engaging in any and all discriminatory or retaliatory actions against plaintiff.

SO ORDERED:

/s/ Nicholas H. Politan

NICHOLAS H. POLITAN
U.S.D.J.

Dated: May 21, 1990

APPENDIX C

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE**

**P.O. BOX 999
NEWARK, NJ
07101-0999**

FOR PUBLICATION

May 23, 1990

**LETTER ORDER
AMENDING OPINION AND ORDER DATED MAY 21, 1990
ORIGINAL ON FILE WITH CLERK OF THE COURT**

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Re: Dr. Alfred Bennun
v. Rutgers, The State University
Civil Action No. 84-4655

Dear Counsel:

This matter being opened to the Court *sua sponte*; the Opinion and Order, dated May 21, 1990, be amended as follows:

Page 27, line 20: After the word "scene.", the following sentence shall be inserted: "Young's testimony is, therefore, simply incredible."

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX D

Filed August 21, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5638

DOCTOR ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY; BOARD OF GOVERNORS
OF RUTGERS STATE UNIVERSITY; and DOCTOR EDWARD
J. BLOUSTEIN, PRESIDENT

(Civil Rights No. 84-4655)

DR. ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY; BOARD OF GOVERNORS
OF RUTGERS STATE UNIVERSITY; and DR. EDWARD J.
BLOUSTEIN, PRESIDENT, RUTGERS STATE UNIVERSITY

(Civil Rights No. 85-3491)

DR. ALFRED BENNUN

v.

RUTGERS STATE UNIVERSITY

(Civil Rights No. 86-621)

RUTGERS, THE STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS, THE STATE UNIVERSITY; and
DR. EDWARD J. BLOUSTEIN,

Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 84-04655)

SUR PETITION FOR REHEARING

PRESENT:

SLOVITER, *Chief Judge*, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD and ROTH, *Circuit Judges*, and
SMITH, *District Judge**

* Hon. D. Brooks Smith, District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation. Judge Smith was limited to voting for panel rehearing.

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Sloviter would grant in banc rehearing for the reasons set forth in her attached Statement Sur Denial of Rehearing In Banc.

Judge Roth would grant in banc rehearing and joins in Chief Judge Sloviter's attached Statement.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

DATED: August 21, 1991

SLOVITER, *Chief Judge*, dissenting from the denial of a petition for rehearing, with whom Judge Roth joins.

I dissent from the denial of rehearing in banc in this case because I believe that the majority's decision may be read to thrust the federal courts of this circuit into the subjective area of academic tenure and promotion decisions to an unwarranted and unprecedented degree.

I do of course accept the proposition that the tenure and promotion decisions of colleges and universities are subject to Title VII. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3rd Cir. 1980). I also accept the proposition that when an academic institution violates Title VII, the court is obligated to fashion an appropriate remedy. *See id.* at 549. On the other hand, we cautioned that,

it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgement for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Id. at 548. *See also Gurmankin v. Costanzo*, 626 F.2d 1115, 1125 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

In the present case, it would appear that this Court may have abandoned the doctrine of restraint set forth in *Kunda*. In *Kunda*, although we affirmed a judicially imposed requirement of tenure, the plaintiff's qualifications were not in dispute, and the court accordingly did not review the college's assessment of her qualifications. In this case, Professor Bennun's qualifications to be full professor were in dispute among the faculty and administration at Rutgers. Thus, from the limited record available to me on a petition for rehearing, it appears that the district court reassessed every decision made by Rutgers regarding Professor Bennun's qualifications and concluded that the court's assessment of the factors under review was superior to the university's. If the court did so in lieu of deferring to the university's ultimate resolution of that dispute, the district court would have gone far beyond the boundaries of review set out in *Kunda*.

I do not believe that it is proper or desirable for the courts of this circuit to become involved in substantive tenure and promotion decisions in the academic setting unless the evidence of discriminatory action is unmistakable. Because I believe that this opinion appears, at least on its face, to be in conflict with our prior restraint, I would grant the petition for rehearing in banc.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

APPENDIX E

FORM NO. 2B

A & P RATING

Candidate's Name: Alfred Bennun

Date: December 6, 1978

	Outstanding	Above Average	Average	Below Average	Limited
Teaching Effectiveness			xxx	x	
Scholarly/creative activity		xxxx			
Research accomplishments			xxxx		
Professional activity	xxxx				
General usefulness			xx	xx	

Narrative

Teaching effectiveness:

The Committee concurs with the Department's comments and evaluation.

Scholarly and creative activity:

See attached page.

Research accomplishments:

Although he has made numerous contributions to conferences and symposia, Dr. Bennun has published his research in refereed journals.

Professional activity:

Dr. Bennun has been extraordinarily active professionally, particularly in presenting his work at conferences and has thereby brought considerable attention to the Newark College of Arts and Sciences.

General usefulness:

Dr. Bennun seems to have participated to a modest degree in departmental matters and in college affairs.

General comments:

(Underline the appropriate terms)

The Advisory Committee:

recommends

Tenure and Promotion

Tenure

does not recommend

Promotion

Number voting YES: 0

Number voting NO: 4

Number ABSTAINING:

Thomas J. Garry
William E. Blume
Hugh W. Thompson
Paul R. Green

Signature of each member of the A & P Committee

Dr. Alfred Bennun

December 6, 1978

Scholarly and creative activity:

Dr. Bennun has been moderately active in his area of research and has produced results which have drawn favorable comment. His theoretical contributions seem to be accepted at least as working hypotheses useful as a basis for further experimentation.

105a

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FORM NO. 2B

A & P RATING

Candidate's Name: Dr. Ethel W. Somberg

Date: November 3, 1978

APPENDIX F

	Outstanding	Above Average	Average	Below Average	Limited
Teaching Effectiveness	XXXX				
Scholarly/creative activity	XXXX				
Research accomplishments		XXX	X		
Professional activity		XXXX			
General usefulness	XXXX				

Narrative

Teaching effectiveness:

The evidence of peer and student evaluation presented supports the rating of outstanding.

Scholarly and creative activity:

Dr. Somberg's scholarly work both in terms of the extent of present and continuing activities and of the quality evident in the published work appears excellent.

Research accomplishments:

The comments of the letters of recommendation and the evaluation of her colleagues suggest that Dr. Somberg's research accomplishments are above average in quantity and of very high quality.

Professional activity:

The committee agrees with the Departmental rating.

General usefulness:

Dr. Somberg has compiled a truly outstanding record of service to the Department, the College and the University as well as to her own discipline within the Department.

General comments:

(Underline the appropriate terms)

The Advisory Committee:

recommends

Tenure and Promotion

Tenure

does not recommend

Promotion

Number voting YES: 4

Number voting NO: 0

Number ABSTAINING:

Thomas J. Day
Hubert W. Thompson
William F. Browne
Tom C. Shea

Signature of each member of the A & P
Committee

FILED
DEC 18 1991

OFFICE OF THE CLERK

(2)
NO. 91-819

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RUTGERS, THE STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS, and DR. EDWARD J.
BLOUSTEIN, PRESIDENT,

Petitioners,

vs.

DR. ALFRED BENNUN,

Respondent.

OPPOSITION TO PETITION BY RUTGERS, ET. AL.
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT

MICHAEL H. SUSSMAN
1 HARRIMAN SQUARE
GOSHEN, NEW YORK 10924
(914) 294-3991

December 18, 1991



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REASONS FOR DENYING PETITION
FOR WRIT OF CERTIORARI

A. THE DECISIONS BELOW ARE
PROPER APPLICATIONS OF LAW

1. Rutgers simply seeks this Court's review of findings of fact entered by the district court at 737 F.Supp. 1393 (D.N.J. 1990) and affirmed by a unanimous panel of the Court of Appeals for the Third Circuit at 941 F.2d 154 (3d Cir. 1991). This Court should decline this invitation and not replace its judgment on findings of fact--including the ultimate fact--whether discrimination has been shown in the challenged promotion decision--for those of the courts below.

Rutgers characterizes the denial of promotion as an "honestly-held subjective judgment" (Petition at 12). But, the district court concluded to the contrary--that the reasons advanced by petition for denying Dr. Alfred Bennun



promotion to full professor in 1979-80 were "incredible" and unworthy of belief.

2. The courts below properly applied well-settled legal standards for assessing claims of intentional discrimination and concluded that Rutgers had, indeed, violated Title VII, 42 U.S.C. sec. 2000e-5, by failing to promote Dr. Bennun to the rank of full professor at its Newark campus.

3. In seeking this Court's review, Rutgers has shamefully and significantly distorted its own internal instructions to those engaged in the peer review process. To buttress its suggestion that the district court erred by comparing Dr. Bennun's qualifications for promotion with those of Dr. Ethel Somberg, a member of the same department who had been promoted to the rank of full professor the year before Dr. Bennun was



rejected, Rutgers has failed to inform this Court that its own instructions to evaluators required them to compare Dr. Bennun's achievements with Dr. Somberg's (and others similarly-situated) in making the promotion decision. As respondent's annual instructions to internal evaluators, cited by the district court, state: "By this process, it is hoped that all significant information with respect to the services and accomplishments of faculty members are rendering within their department, within their college, within their scholarly field, and within the University will be brought out and compared with the services and accomplishments of other colleagues with the same or similar duties." (JA-2282) (emphases added). And, contrary to petitioner's suggestion, Somberg and Bennun were similarly situated and both



evaluated in light of the same criteria, identically weighed.

4. Rutgers argues that the district court and the Court of Appeals should not have "substituted" their judgments for the peer review process by which Rutgers makes promotion decisions. Absent, petitioner claims, a "smoking gun", respondent could never prevail on his claim of intentional discrimination. In so submitting, Rutgers simply misstates the law, both with regard to Title VII claims generally, and to those cases arising in a university setting.

In Washington v. Davis, 426 U.S. 229, 241-42 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1976), this Court made clear that, to establish intentional discrimination, a plaintiff may prove that, in his case, the



decision-maker significantly diverged from the substantive standards it applied to other like persons or entities. The same principle applies in employment discrimination cases. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Trans World Airlines Inc. v. Thurston, 469 U.S. 111, 121 (1985).

Proof of differential treatment between similarly-situated persons raises an inference of impermissible discrimination which a defendant must meet by the articulation of some non-discriminatory basis for the challenged decision. Burdine, 450 U.S. at 255. As the district court properly explained, "If the defendant meets this burden the inference of discrimination created by the prima facie case is eliminated and the burden shifts



back to the plaintiff who must prove by a preponderance of the evidence that the reasons asserted by the defendant were a pretext for discrimination. Id. at 253.

The plaintiff may meet this burden either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence. Id. at 256.

5. Here, the district court applied precisely this analytical framework and concluded that (a) the respondent had demonstrated qualifications sufficient to merit promotion to full professor and (b) Rutgers' effort to explain why Somberg, the Caucasian professor from respondent's department promoted the year before he was denied advancement, was promoted were "incredible" and unworthy of belief. (JA-2309).



Rather than focus on the explanation offered by Vice President Alexander Pond, who was not at Rutgers in 1979-80, the district court carefully evaluated the promotion packets of Somberg and Bennun and evaluated the testimony of those involved in the promotion decisions before concluding that there was simply no non-discriminatory manner in which fair evaluators could rate them comparable in the heavily-weighted areas of research accomplishment and scholarly activity.

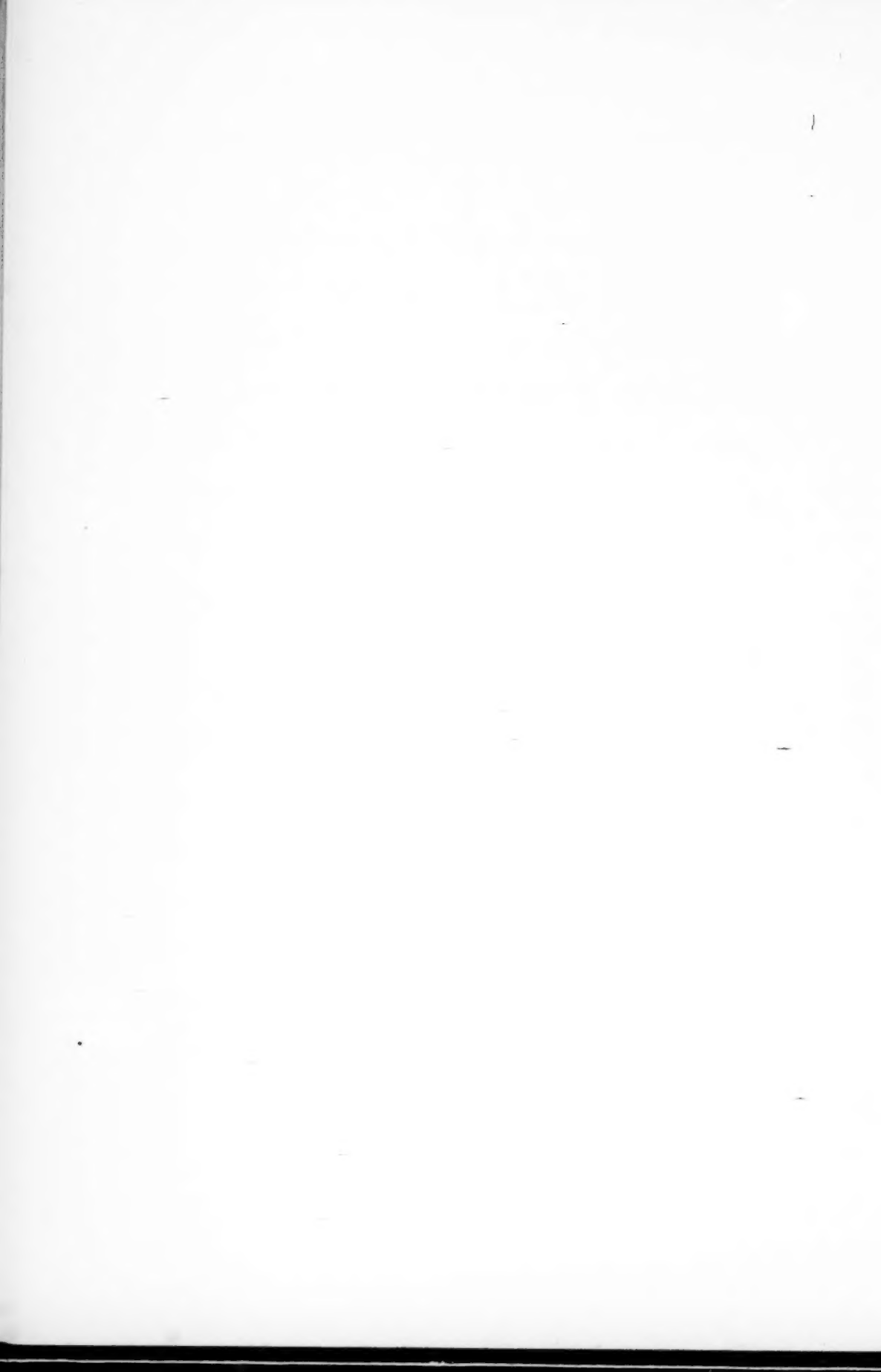
While internationally famous scientists, who cited specific contributions he had made to his field, supported Bennun's promotion, Somberg lacked any such support. While Bennun had extensive refereed publications and grant support and been invited to give numerous presentations before international scientific meetings, Somberg lacked such



objectively-ascertainable credentials.

Despite Bennun's vastly superior record, petitioner's Biochemistry Section, required by university regulations to rate candidates only for research accomplishments and scholarly activity, supported Somberg's promotion but not, the next year, Bennun's. Moreover, the district court found that the Promotion Review Committee, chaired by then Provost Joseph Young, applied different substantive standards to Bennun than it had to Somberg. It required Bennun to show that he had "become an influential investigator on the national and international scene", while requiring Somberg to show only that she was "intellectually alive". (JA-2296).

The district court properly concluded that these, among many other variances in substantive standards of evaluation,



demonstrated that Rutgers had intentionally discriminated against respondent on the basis of his national origin.

6. The Court of Appeals likewise properly performed its reviewing role: it too found that Bennun had shown sufficient bona fides "to meet the qualification prong of the prima facie case." (50a). The court then found that the record "amply" showed that Somberg was "treated more favorably than Bennun". (51a). Specifically, the Court of Appeals affirmed the district court's finding that petitioner's explanation for the denial of respondent's promotion--"because the University evaluators thought his research was deficient" (51a)--was pretextual.

After upholding the district court's comparison of Somberg and Bennun (54a-55a), the Court of Appeals noted the record support for the finding of pretext:



the Appointments and Promotions Committee found Somberg's publications "above average in quantity", while characterizing as questionable Bennun's far superior output. (56a). As the Court of Appeals concluded, "Over a fifteen year period (1964-1979) Somberg had eighteen fewer publications than Bennun did over a twelve year period (1969-1981). These facts indicate that it is not an unwarranted invasion of the college's tenure process to determine that Bennun was held to higher standards in objective terms." (Id.). (emphasis added).

The Court of Appeals identified another clear indication of double standards in the Biochemistry Section's evaluations of the two candidates. "the section rates candidates only on their research and scholarly activity. Yet the section wrote that Somberg's 'recent



publications [were] evidence of continuing research activity,' (JA at 1832), while Bennun was downgraded because his 'total output [was] insufficient.' (JA at 1256). This conclusion is surprising because Somberg only published three pieces over the three years prior to her promotion (1976-1979) while Bennun published eight pieces in the three years (1978-1981) prior to his promotion denial in 1980-81. The section recommended Somberg for promotion despite the fact that her recent career production was inferior to Bennun's. This is another clear example of the disparate treatment that Bennun was subjected to." (56a-57a).

7. In response to Rutgers' suggestion that Somberg was promoted because she received one "outstanding" rating and Bennun received none, the Court of Appeals sagely noted, "But if



throughout the promotion process the same standards applied to Somberg had been applied to Bennun, an unbiased observer might reasonably conclude that Bennun should have gotten at least one outstanding rating." (57a).

Put another way, the Court of Appeals found that Bennun's strengths were not "given the same overall weight as were Somberg's. In one of Bennun's strongest areas, research accomplishments, he was held to a higher standard than Somberg. Rutgers' articulated non-discriminatory reliance on the five criteria, taken as a whole, in deciding not to promote Bennun is so undermined by its inconsistency in applying them that we cannot hold the district court's finding was clearly erroneous." (58a).

8. In affirming the district court's decision, the Court of Appeals paid proper

deference to the peculiar fact-finding function conferred on district courts. Here, Judge Politan simply did not believe petitioner's witnesses. He found their explanations of their ratings incredible and not worthy of belief. From this, the district court quite properly inferred pretext and ruled for plaintiff. As the Third Circuit more eloquently stated: "The district court found Rutgers' reasons 'unworthy of credence.'" Burdine, 450 U.S. at 256 (citing McDonnell Douglas Corp., 411 U.S. at 804-05). The district court, not this court, finds facts and assesses credibility. Like any factfinder, it can accept some parts of a party's evidence and reject others. It may also, like any factfinder, assess credibility in light of the maxim, falus in uno, falsus in omnibus... We are unable to say, as a matter of law, that it erred



in its determinations." (55a-56a).

Nor should this Court second-guess the judgment entered below--that Rutgers engaged in intentional discrimination when it denied Bennun promotion to the rank of full professor.

B. THE DECISIONS BELOW CONFLICT
WITH NO PRECEDENT OF THIS COURT

1. Rutgers would have this Court grant a gaping exception to Title VII for this nation's colleges and universities. Yet, the 1972 amendments to Title VII were enacted expressly to bring such entities within the compass of civil rights legislation. University of Pennsylvania v. E.E.O.C., 110 S. Ct. 577, 582 (1990) ("This extension of Title VII was Congress' considered response to the widespread and compelling problems of invidious discrimination in educational institutions.").



As Justice Blackmun pointed out for a unanimous court in University of Pennsylvania, "Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members." Id. And, in language equally applicable here, the Court rejected petitioner's argument that concern for "academic freedom" should override the national objective of ridding universities of invidious racial discrimination: "Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption of educational institutions." Id.

2. Moreover, not only did University of Pennsylvania, supra., generally rebuke the position taken here by petitioner: it



specifically considered and rejected its central argument--that the court cannot compare the credentials of like-situated college faculty members to discern impermissible discriminatory conduct. To the contrary, this Court found that the promotion packets of other faculty members may be highly relevant in assessing claims of discrimination in promotion, quoting approvingly from the Third Circuit's opinion in EEOC v. Franklin & Marshall, 775 F.2d 110, 116 (1985), cert.denied, 476 U.S. 1163 (1986): "...[C]onfidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure...", at 110 S.Ct. 584. if this Court intended to prohibit courts from comparing the qualifications of those being considered for tenure and promotion, it would have



chosen far different language to express this intention.

3. Just as accepting Pennsylvania's First Amendment arguments would have vitiated Title VII in University of Pennsylvania, supra., at 585, accepting Rutgers' contentions here would yield to "no limiting principle". Many employers would be encouraged to claim that they too employ highly subjective bases in making employment decisions and that people who otherwise appear similarly situated, i.e., members of the same department at the same time, are really quite different for purposes of comparison. In such manner, any exception to Title VII's requirement that courts make searching inquiry into employment decisions to ferret out and prevent discrimination would be eviscerated in a flood of claimed objections based upon the allegedly



subjective nature of the challenged employment decision.

4. In seeking the writ here, Rutgers does not point to any precedent which the decisions below contravene. The Third Circuit decision does not impinge in any manner on any valid First Amendment right possessed by petitioner. Cf., University of Pennsylvania, supra., at 587. Nor have the courts below engaged in the second guessing of legitimate academic judgments. Id. Instead, they have enforced Title VII in a manner similar to that of numerous other courts, without any of the disastrous impact petitioner predicts.

5. Other courts have made the same searching analysis as the district court below and reached the same conclusion. Indeed, such a comparative analysis is the only means by which the discrimination Congress sought to root out through the



1972 amendment to Title VII can effectively be identified and eliminated.

Rutgers surely would prefer a regime in which universities are immune from the searching analysis engaged in below. But, Congress has determined that this would unduly perpetuate discrimination in higher education and has rejected the immunity from suit petitioner seeks.

6. Nor do the cases Rutgers cites show a different analytical framework than that employed by the courts here. In Villanueva v. Wellesley College, 930 F.2d 124 (1st Cir. 1991), an assistant professor sued after being denied tenure. Upholding the district court's grant of summary judgment for the college, the First Circuit held that Villanueva had failed to show that the college's "articulated reason for the tenure decision was 'obviously weak or im-



plausible' or that the standards were 'manifestly unequally applied.'" (at 131). In reviewing plaintiff's effort to meet these standards, the First Circuit compared, just as the courts below did, the aggrieved candidate's credentials with those of others from his department who were contemporaneously given tenure.

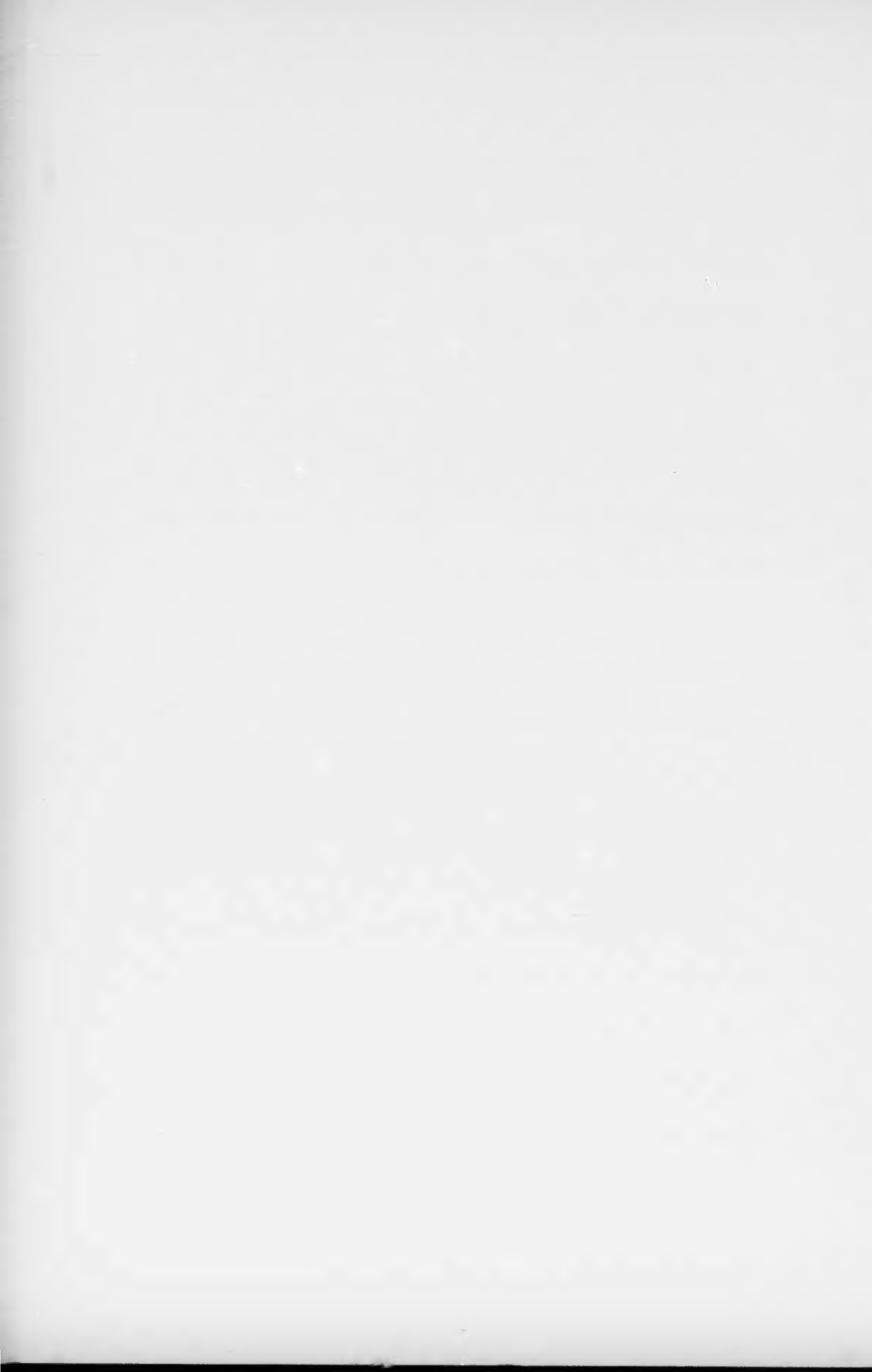
Unlike the result reached here, where the district court concluded that petitioner's reasons for denying Bennun promotion were "incredible" and the Court of Appeals found the standards applied to him "clearly" different from those applied to Dr. Somberg, the First Circuit reached a contrary conclusion in Villanueva. Other than the difference in outcome, explainable by the specific facts of each case, there is no methodological difference between these cases which requires reconciliation or resolution by this



Court.

7. Nor is the Third Circuit's decision below inconsistent with its own prior holding in Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3rd Cir. 1980), where the Court of Appeals made quite clear that district courts could most certainly prevent subjective standards, precisely like those employed here, from being "used as the mechanism to obscure discrimination."

In reviewing the evidence below, both the district court and the Third Circuit reached precisely that conclusion: that Rutgers had dressed its discrimination against Bennun up in the criteria of subjectivity when its actual intent was to deprive him of promotion on the prohibited basis of his national origin. Uncovering this ruse and exposing it for what it is does not violate, but rather vindicates,



Title VII.

C. PETITIONER SEEKS TO DISTORT THE
FINDINGS OF FACT MADE BELOW

Rather than perform a "subjective" analysis and "second guess" the university decision-makers, the courts below sought to verify that the bases adduced by them for their action comported with the facts. Finding, to the contrary, that the facts give the lie to the reasons Rutgers articulated for denying Bennun promotion, the courts found the university's explanations unworthy of belief and pretextual.

In its petition, the university continues the same pattern of distortion it sought--without success--use below. It selectively analyzes the evidence and attempts to pick, choose and then present without context those morsels which might cause a reviewing court to find the

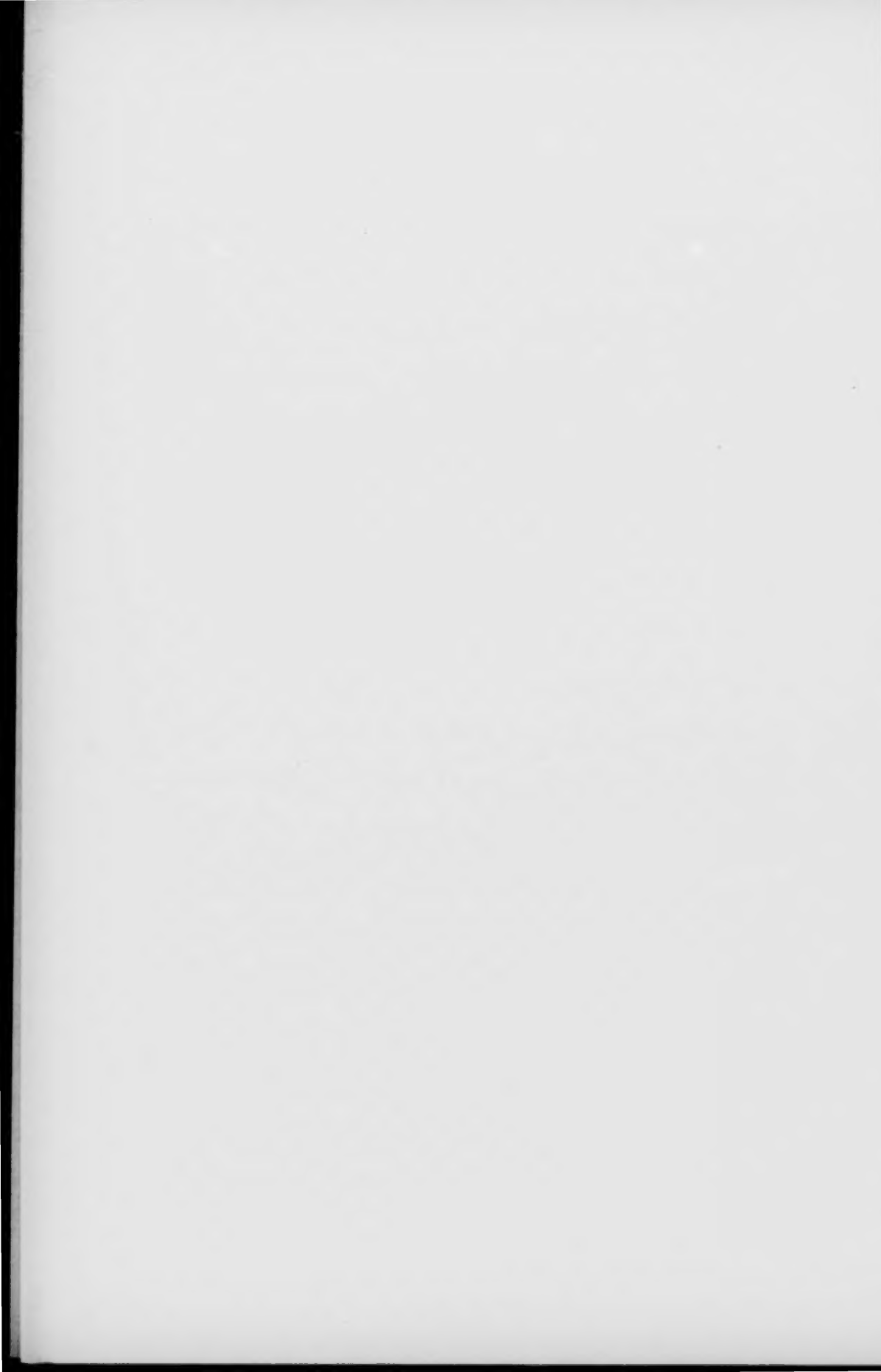


district court's findings of fact clearly erroneous.

Some matters Rutgers cannot change, however. First, Bennun had numerous refereed publications, more than three times as many as did Somberg during the relevant time. Second, those vouching for the high quality of Bennun's contribution to science through these writings were world-renowned scientists, including Nobel Prize winners. Somberg had no external peer reviewer of high reputation support her candidacy for promotion. Third, Bennun had received much more external funding support than Somberg, another piece of evidence supporting his reputation and the quality of his research. According to the participants in the promotion process, these were precisely the factors the evaluators were supposed to consider in deciding whom to

promote. Fourth, the promotion process was to be bounded by written materials included in the promotion packet. Contrary to Rutgers' contention, the district court properly noted that while the Zoology and Physiology Department more highly rated Somberg's teaching, the objective evidence supporting this evaluation was lacking. Bennun taught a more diverse course load. The two had strikingly similar student evaluations for their teaching.

While Rutgers seeks to insulate its promotion decisions from review by characterizing these matters all as "subjective", the courts below deemed these matters "objective"--that is, amenable to comparison without involving the court in its own determination of whose work was better and why. Rutgers has presented no persuasive argument to



the contrary.

Moreover, again contrary to Rutgers' position, as a finding of fact, Judge Politan determined that petitioner's allegedly non-discriminatory articulation was "incredible", not worthy of belief and, therefore, could not have been "honestly held". (Petition at 21).

D. THE DECISIONS BELOW WILL NOT
TILT THE EQUILIBRIUM FROM
CAREFUL JUDICIAL REVIEW OF
CONTESTED ACADEMIC DECISIONS

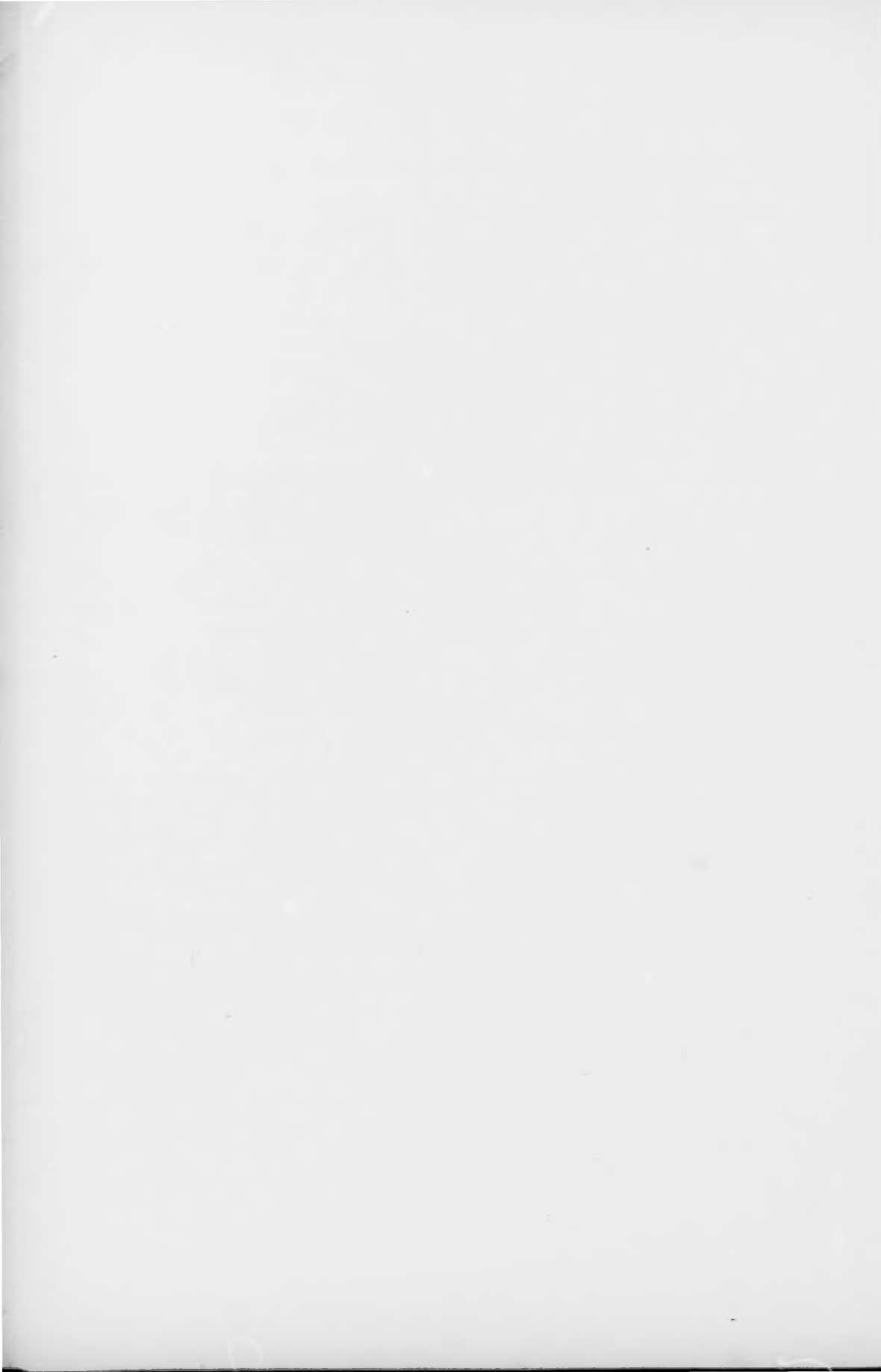
The Third Circuit has been at the forefront of the application of employment discrimination law to the university. Its recognition of Congressional intent--to purge the academic workplace of discrimination--has been balanced by a searching inquiry to insure that university decision-making is overruled only when promotion and tenure decisions carry forward prohibited discrimination.



Institutions like Rutgers may continue to rely on subjective judgments in tenuring and promoting staff, but, at the same time, must exert sufficient centralized control over such decisions to insure that invidious discrimination is not affecting or controlling them.

Such a procedure fully comports with Congressional intent and is respectful of one central role of the university in this society--to carry forward the values of tolerance and civility in a non-discriminatory atmosphere.

Any other regime--particularly one highlighted by less judicial scrutiny--will encourage the re-emergence of the very discriminatory conduct which Congress so plainly sought to countervail through the 1972 amendments.



CONCLUSION

FOR THESE REASONS THE PETITION FOR A
WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Dated: December 18, 1991
Goshen, New York

MOTION FILED
DEC 19 1990

No. 91-819

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

RUTGERS, THE STATE UNIVERSITY; BOARD OF
GOVERNORS OF RUTGERS, THE STATE UNIVERSITY;
and DR. EDWARD J. BLOUSTEIN,

v. *Petitioners,*

DR. ALFRED BENNUN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AND BRIEF OF *AMICI CURIAE*
AMERICAN COUNCIL ON EDUCATION, NEW YORK
UNIVERSITY, THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, THE TRUSTEES OF PRINCETON
UNIVERSITY, THE UNIVERSITY OF MICHIGAN,
AND THE UNIVERSITY OF PENNSYLVANIA
IN SUPPORT OF PETITIONERS

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IN THE
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OCTOBER TERM, 1991

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On Petition for a Writ of Certiorari to the
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**MOTION OF THE AMERICAN COUNCIL ON
EDUCATION, NEW YORK UNIVERSITY,
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
THE TRUSTEES OF PRINCETON UNIVERSITY,
THE UNIVERSITY OF MICHIGAN, AND
THE UNIVERSITY OF PENNSYLVANIA
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

The American Council on Education, New York University, the Regents of the University of California, the Trustees of Princeton University, the University of Michigan, and the University of Pennsylvania hereby move pursuant to Rule 37.2 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of petitioners. Petitioners' counsel have consented to the filing of this brief and consent of respondent's counsel has been requested but was denied.

New York University, Princeton University, the University of California, the University of Michigan, and the University of Pennsylvania ("the Universities") are private and public universities regularly engaged in the process of making decisions concerning tenure and academic promotion. In making these decisions, the Universities rely upon the mechanism of peer review, which aptly has been described "as essential to the very lifeblood and heartbeat of academic excellence." *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 336 (7th Cir. 1983). The American Council on Education is a voluntary membership organization representing more than half of all American colleges and universities. The interests of all movants as *amici* are more fully described in the accompanying brief (pp. 1-2).

The movants seek to raise important matters not fully addressed by the parties concerning the potential threat to the peer review system of faculty evaluation presented by an overreaching application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in the academic employment context. Movants believe that their broader perspective on the issue presented by petitioners will assist the Court in evaluating the national importance of the decision below.

For these reasons, the movants request leave to file this brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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**BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON
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THE UNIVERSITY OF MICHIGAN,
AND THE UNIVERSITY OF PENNSYLVANIA
IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICI CURIAE*

New York University, Princeton University, the University of California, University of Michigan, and the University of Pennsylvania ("the Universities") are private and public institutions of higher education. As such, the Universities are regularly engaged in the process of reviewing candidates for academic appointments, tenure, and promotions. The "peer review" process employed by the Universities and their faculties in making academic

employment decisions lies at the core of academic self-governance.

The American Council on Education ("ACE") is the nation's major coordinating body in postsecondary education. Founded in 1918, ACE is a voluntary membership organization composed of more than 1,300 nonprofit institutions of higher education from both the public and private sectors and more than 175 educational associations and organizations. As an association of more than half of all American colleges and universities, ACE is uniquely able to represent the interests of the higher education community in legal matters of national importance, including the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as it applies to this case.

The Universities and ACE have a direct and powerful interest in the manner in which statutes such as Title VII are applied to academic tenure and promotion decisions. Although each of the Universities has a long-established and demonstrated commitment to eradicating invidious discrimination from their campuses, each also recognizes that governmental scrutiny of academic employment decisions has the potential to trench upon values of academic freedom and legitimate institutional autonomy.

Because of their institutional interest in the development of the law at issue here, the Universities and ACE respectfully seek leave of the Court to participate as *amici curiae* in support of the petitioners in this case.

STATEMENT

Respondent Dr. Alfred Bennun, an associate professor of biochemistry, repeatedly sought promotion to the rank of full professor from his employer, Rutgers, the State University of New Jersey ("Rutgers" or "the University"). At least five times the University subjected Dr. Bennun to the scrutiny of the academic peer-review process and each time the University, acting through Dr.

Bennun's peers, concluded that Dr. Bennun, although showing some accomplishment as a researcher, did not merit advancement under the University's promotion criteria. Dr. Bennun challenged the University's decisions as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that the University had in fact denied him promotion because he is Hispanic.

At trial, Dr. Bennun produced no direct evidence that any participant in the peer review process at Rutgers had been influenced in any way by discriminatory animus. *See Bennun v. Rutgers*, 737 F. Supp. 1393, 1400-01 (D. N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991). Indeed, there was no evidence of discriminatory animus by the University aimed at either Dr. Bennun or any other employee. Rather, Dr. Bennun rested his case exclusively upon his comparison of his own qualifications with those of candidates who had won promotion to full professor. *Id.*

The district court, applying the analytical framework set out in this Court's opinions in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), found that Dr. Bennun had carried his burden of making out a *prima facie* case of discrimination.¹ The court also found that the University had carried its burden of articulating a legitimate, nondiscriminatory reason for its action: it had assertedly denied promotion based upon its assessment of Dr. Bennun's overall academic qualifications. *See Bennun*, 737 F. Supp. at 1407. Consequently, the pivotal dispute arose over whether Dr. Bennun had

¹ Specifically, the court found that Dr. Bennun had proved by a preponderance of the evidence that he was a member of a class protected by the statute, that he sought and was denied a promotion for which he was arguably qualified, and that nonmembers of the protected class won similar promotions. *See Bennun v. Rutgers*, 737 F. Supp. 1393, 1398-99, 1401-05 (D.N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991); see also *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 170-77 (3d Cir. 1991).

carried his burden of persuasion that the University's stated reasons for its decision were a mere pretext for racial discrimination.

The district court accepted, as did the court of appeals, Dr. Bennun's argument that it was appropriate for the court to compare his academic credentials with those of other candidates who had won promotion and to decide for itself whether he merited promotion to the rank of full professor at Rutgers. Based solely upon its own assessment of Dr. Bennun's relative strength as a candidate for promotion, the district court declared the University's assessment of Dr. Bennun's merit to be pretextual and ordered that Dr. Bennun be granted a full professorship. *See id.* at 1407-09. The Third Circuit affirmed the district court's Title VII rulings in all respects. *See Bennun v. Rutgers State Univ.*, 941 F.2d 154, 170-80 (3d Cir. 1991).²

ARGUMENT

I. BACKGROUND: ACADEMIC FREEDOM AND THE APPLICATION OF TITLE VII

There is no dispute that Title VII applies to university employers.³ A claim of invidious discrimination in academic employment is, and should be, actionable, and the

² Although *amici* are convinced that the process by which the lower courts concluded that Dr. Bennun deserved promotion was fundamentally flawed, they do not mean to imply that Dr. Bennun does not warrant a promotion. That is an issue that *amici* are no better suited to evaluate from a distance than are the courts in this case. *Amici's* interest is limited to assuring that Title VII is applied to institutions of higher education in a manner that fairly balances their interest in academic autonomy and the public interest in eliminating all invidious discrimination. The decision of the court of appeals fails to strike that balance.

³ In 1972, Congress repealed the exemption which had previously taken educational employees outside the scope of Title VII's protection. *See University of Penn. v. EEOC*, 493 U.S. 182, 189-90 (1990).

federal courts must be permitted to review the disputed employer action to determine whether the complainant was the victim of discrimination. What remains unsettled, however, is whether a university's employment decisions with regard to faculty must be tested against precisely the same standard as applied to non-academic employers.

It is widely accepted that the familiar *McDonnell Douglas-Burdine* analytical framework may be shaped by the demands of particular circumstances. This Court has made clear that the *McDonnell Douglas* framework was "never intended to be rigid, mechanized or ritualistic," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), and that the standards of proof required of plaintiffs legitimately may vary depending upon the peculiar factual setting of the complaint, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973). The question presented by this case—one that has left the circuits in disarray for more than a decade—is whether the *McDonnell Douglas-Burdine* analytical model should be adjusted in the academic employment context. Compare, e.g., *Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980) (rejecting modification of the *McDonnell Douglas* model as applied to academic employment decisions) and *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980) (same) with *Villanueva v. Wellesley College*, 930 F.2d 124, 128 (1st Cir.) (rejecting "a mechanical application of the *McDonnell Douglas* framework" as applied to academic employment decisions), *cert. denied*, 112 S. Ct. 181 (1991) and *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) ("[academic] freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments").⁴

⁴ Likewise, the issues have generated considerable debate but little consensus among commentators. Compare, e.g., Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev.

The First Amendment values at stake are vital. This Court has recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as 'a special concern of the First Amendment.'" *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted). The Constitution's concern for academic freedom includes "[t]he freedom of a university to make its own judgments as to education," *Bakke*, 438 U.S. at 312 (opinion of Powell, J.), and "to determine for itself on academic grounds who may teach," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).⁵

945 (1982) (arguing against applying a different standard to academic employers) with Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. Davis L. Rev. 1047 (1983); Note, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 Colum. L. Rev. 1206, 1227 (1982) ("First amendment values suggest that universities should be treated differently from other employers under title VII when making independent decisions on matters important in shaping their academic identities."); and Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 Wash. U. L.Q. 445, 468-70 (1987) (concluding that "[t]he McDonnell Douglas approach is inadequate" in the academic employment context and proposing a modified system of somewhat higher burdens of proof).

⁵ See generally Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 311-40 (1989); Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1310-19 (1988); Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817, 829 (1983).

The constitutional significance accorded to the university's interest in self-governance is rooted in the recognition that educational institutions *are* genuinely different from all other economic and social institutions, and that they occupy a special place in a democratic society.⁶ It is the special character of the university that has led this Court to recognize the national "commit[ment] to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Because of the foundational importance of academic inquiry in the life of the nation, this Court has "protected principally and expressly a First Amendment right of the university itself . . . largely to be free from government interference in the performance of core educational functions."⁷ Among these core educational functions which lay claim to constitutional protection is the academic peer review process through which universities "determine . . . on academic grounds who may teach." A

⁶ See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die"); cf. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (acknowledging, in the context of a suit brought under the National Labor Relations Act, that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world'" (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973))).

⁷ Byrne, *supra* note 5, at 311 (footnote omitted); see also *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) (the Constitution's protection of academic freedom requires "the exclusion of governmental intervention in the intellectual life of a university").

university's hiring and tenure decisions significantly define its future intellectual character and mission. By vesting powerful influence over these decisions in the collective judgment of the university faculty itself, the peer review system ensures that the difficult task of evaluating a scholar's contributions and promise will be assigned to those best suited to the task. In addition, it secures for the university faculty meaningful control over the future life of the university.⁸ Indeed,

[p]eer review is the canonical procedure for determining "who will teach." . . . Peer review consigns evaluation of a faculty candidate in the ordinary course to fellow faculty whom we must presume to be both competent to evaluate scholarly accomplishment and promise and dedicated to the tradition of academic freedom which seeks to separate the question of competence from exogenous factors.

Byrne, *supra* note 5, at 319. In short, "[a]cademic freedom has no meaning without peer review." *Id.*

⁸ "A decentralized decision-making structure founded largely on peer judgment is based on generations of almost universal tradition stemming from considerations as to the stake of an academic department in such decisions and its superior knowledge of the academic field and the work of the individual candidate." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984); see also American Association of University Professors, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP Policy Documents & Reports 10, 10 (1984) ("It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership").

II. THERE IS A CONFLICT IN THE CIRCUITS OVER THE JUDICIARY'S PROPER ROLE IN REVIEWING UNIVERSITY EMPLOYMENT DECISIONS

A.

In applying Title VII to educational institutions, most courts, cognizant of the competing First Amendment values at stake, have held that judicial scrutiny of faculty employment decisions must be tempered in the academic context. Faced with the seeming tension between competing societal and legal values, most courts have tried "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior." *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

Theoretically, of course, there is no conflict between the university's First Amendment interest in "determin[ing] for itself on academic grounds who may teach," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), and judicial inquiry to ensure that a university does not determine on impermissible, *nonacademic* grounds who may join its faculty. See, e.g., *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); Byrne, *supra* note 5, at 319. Indeed, judicial inquiry, tempered by sensitivity to the complexities of academic evaluation and with due regard for the competing values at stake, is wholly compatible with the Constitution's protection of institutional academic freedom. The same inquiry, however, undertaken without modification of the usual *McDonnell Douglas* framework to account for the peculiarities of the academic setting may imperil academic freedom: a court's insensitivity to the subtle distinctions that must be drawn in assessing academic candidates may lead the court to decide for itself, on alternative academic grounds, who should teach.

To protect against this risk, the First Circuit, for example, has held that the standard *McDonnell Douglas*

framework must not be applied “mechanical[ly]” in the context of academic decisionmaking. *Villanueva v. Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991). Rather, the “delicate equilibrium” between a university’s academic freedom and the courts’ duty to eradicate discrimination requires a modification of the burden the plaintiff must carry in persuading the court that the employer’s articulated basis of decision is pretextual.

In nonacademic employment contexts, where an employer justifies its employment decision based upon its assessment of a candidate’s qualifications, the unsuccessful candidate may sometimes demonstrate pretext by simple comparisons showing that her qualifications were, in fact, the same as or better than the successful candidate.⁹ In the academic employment context, however, in part because of the far more complex problem of measuring a teacher-scholar against the standards of a particular institution at a particular time and in part because of the unique First Amendment considerations at stake, something more must be required. Consequently, in the First Circuit, the plaintiff

must convince a trier of fact . . . that the defendant’s articulated reasons for denying tenure “were ‘obviously weak or implausible,’ or that the tenure standards for prevailing at the tenure decisions were

⁹ See, e.g., *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (because “the[] facts tend to show that [the successful candidate chosen in plaintiff’s stead] may not have been the best person to lead the group, . . . they therefore suggest that leadership ability may not have been the real reason for choosing [the successful candidate] over [the plaintiff]”); *Alvrado v. Board of Trustees*, 928 F.2d 118, 122 (4th Cir. 1991) (plaintiff’s greater experience and length of service as a janitor suggests that employer’s claim that successful candidate was better qualified was pretextual); *Senigaur v. Beaumont Indep. School Dist.*, 730 F. Supp. 1200, 1205 (E.D. Tex. 1991).

'manifestly unequally applied.' The essential words are 'obviously' and 'manifestly.' A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.

Id. at 129 (quoting *Kumar v. Board of Trustees*, 774 F.2d 1, 15 (1st Cir. 1985) (Campbell, J., concurring), *cert. denied*, 475 U.S. 1097 (1986)).

The Second and Seventh Circuits have applied similarly deferential standards in the university employment context. The Second Circuit, for example, has suggested that comparisons between scholarly candidates are often of little use in divining pretext and that courts should stop short of the sort of *de novo* review of a candidate's academic credentials approved by the Third Circuit in this case. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984) ("tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally"); *see also Lieberman v. Gant*, 630 F.2d 60, 67-68 (2d Cir. 1980) (Friendly, J.) (trial judge "did not err in declining plaintiff's invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess the numerous scholars at the University of Connecticut who had scrutinized [the plaintiff's] qualifications and found them wanting").¹⁰ "[F]or

¹⁰ The *Zahorik* court explained:

Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Deter-

a plaintiff to succeed in carrying the burden of persuasion, the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university." *Zahorik*, 729 F.2d at 94.

In *Namenwirth v. Board of Regents*, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986), the Seventh Circuit, too, was confronted with a case in which an unsuccessful tenure candidate rested her allegation of pretext almost entirely upon "comparative evidence concerning the qualification[s] of males tenured at about the same time [the plaintiff] was denied tenure." *Id.* at 1241. The court acknowledged that such comparisons, although perhaps "more difficult in the case of professional and academic employment decisions," are relevant in determining whether the employer's articulated reasons for its decision are pretextual. *Id.* at 1240-41. Nonetheless, the court refused to review *de novo* the univer-

mination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited.

729 F.2d at 93.

In addition to the concerns about the ability of courts to engage in effective comparative review of the academic evaluations and judgments of university faculty, some courts also have observed that such cases impose significant burdens on the resources of the trial courts. Judge Friendly, for example, noted in the *Lieberman* case that trial of the plaintiff's claim "produced a transcript of nearly 10,000 pages and almost 400 exhibits and consumed 52 days of court time." *Lieberman v. Gant*, 630 F.2d 60, 62 (2d Cir. 1980). As Judge Friendly observed, such exhaustive and costly trials are virtually inevitable where judges are required to review the enormously complex and fact-intensive process by which a university makes tenure and promotion decisions affecting a comparative range of candidates. *See id.* at 62 n.1 ("We do not understand how either the federal courts or universities can operate if the many adverse tenure decisions against women or members of a minority group that must be made each year are regularly taken to court and entail burdens such as those here incurred").

sity's assessments concerning the relative qualifications of academic candidates:

The [plaintiff's] evidence consists for the most part of comparative evidence of research quality and potential. That means that it consists in large part of the opinions of academics who serve not only as experts on qualifications but also as decision-makers in the tenure process. It is not our role, as federal courts have acknowledged, to consider merely the hard evidence of research output and hours spent on committee work, and reach tenure determinations *de novo*.

Id. at 1242.¹¹ Although aware that deference to the assessments of those who are alleged to have discriminated may appear paradoxical, the court justified this deference on grounds of relative institutional competence.¹²

All three Circuits—the First, Second, and Seventh—recognize the broad relevance of comparative evidence of candidates' credentials in making out an indirect case for pretext, but agree that such evidence should succeed only

¹¹ This Court, too, in another context, has recognized the judiciary's limited capacity for "evaluat[ing] the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978)).

¹² [I]n the case of tenure decisions we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions.

Namewirth v. Board of Regents, 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).

where plaintiffs meet a heightened burden of demonstrating a “manifest” inequality of treatment. None, for example, would permit a plaintiff to prevail based upon comparative evidence suggesting that the plaintiff was *as qualified as or somewhat better qualified than* a non-protected fellow employee who won tenure or promotion. Rather, each would demand some higher showing—*e.g.*, “a claim that [the] plaintiff’s qualifications were clearly and demonstrably superior to those of the successful [candidates]”¹³ or “evidence . . . so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in opinion.”¹⁴ What is important at this stage is not the precise formulation of the burden, but rather the judicial recognition that some *heightened* standard is appropriate in light of the unique countervailing values at stake in the academic setting.

B.

The Third Circuit has squarely rejected the view that academic employment decisions merit different consideration under Title VII. See *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 174 (3d Cir. 1991) (“no special deference is to be paid to the tenure and promotion decisions of universities when they are scrutinized under Title VII”) (emphasis omitted); *Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980).¹⁵ Although the Third Circuit previously had declared its view that academic employment decisions were to be tested against the same *McDonnell Douglas* analysis applied to nonacademic employers,¹⁶ that declaration had been tempered with simul-

¹³ *Lieberman*, 630 F.2d at 68.

¹⁴ *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 347 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

¹⁵ *Accord Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980).

¹⁶ See *Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980).

taneous admonitions that courts “should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.”¹⁷ In *Bennun*, however, it is evident from the inquiry actually undertaken by the court that the Circuit has abandoned any effort at moderation:

In its disparate treatment analysis, the district court compared Bennun's review packets [containing his *curriculum vitae*, peer review evaluations, and similar papers] with those of Dr. Ethel Somberg, a professor in the same department as Bennun. Somberg had been promoted from Associate Professor to Full Professor in 1979. Relying in part on its comparison of Somberg's academic credentials with Bennun's, the district court held that Bennun had made out a *prima facie* case of disparate treatment and that Rutgers' proffered nondiscriminatory reason, failure to meet the university's high standards for full professorship in the judgment of his peers, was a pretext for discriminat[ion]

Bennun, 941 F.2d at 158-59 (citations omitted).¹⁸

The *Bennun* court's comparison of the relative “academic credentials” of the two candidates, based upon nothing more than the hypothesis that Dr. Bennun was at least as qualified as Dr. Somberg, points out the very real dangers presented by the insensitive application of traditional Title VII standards to the academic setting. The court, for example, assessed “the extent” of the candidates' respective research efforts by tallying up their

¹⁷ *Kunda*, 621 F.2d at 548.

¹⁸ Certainly Chief Judge Sloviter, who dissented to the denial of rehearing *en banc*, believed that the *Bennun* decision marked a sharp change in course: “In the present case, it would appear that this Court has abandoned the doctrine of restraint set forth in *Kunda*.” *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 181 (3d Cir. 1991) (Sloviter, C.J., dissenting from denial of rehearing *en banc*).

respective number of publications listed in their promotion packets, *see Bennun v. Rutgers*, 737 F. Supp. 1393 (D.N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991); it concluded that "Bennun's packet . . . was objectively stronger than Somberg's in that it contained more letters from significant scholars in the Biochemistry field," *id.* at 1406; it decided that "various evaluations of Bennun's teaching were very similar to evaluations of Somberg's," *id.*; and, "perhaps most importantly," it disagreed with "the University's contention that Bennun was mediocre in all areas besides research," *id.* at 1406-07. Based on its independent and *de novo* assessment of the relative academic merit of the two faculty members, the court concluded that "the reasons articulated by the University concerning Bennun[']s academic merit] are simply not believable," and dismissed them as a pretext for invidious racial discrimination. *Id.* at 1408.¹⁹

C.

Amici do not contend that university tenure and promotion decisions may never be tested by way of comparative analysis between the complainant and other, successful candidates. There are cases in which a university's

¹⁹ The conflict between the Third Circuit's approach and the more restrained approaches of other Circuits is obvious. *Compare, e.g., Bennun*, 941 F.2d at 158 (affirming the trial court's judgment for Dr. Bennun based upon "its comparison of Somberg's academic credentials with Bennun's") with *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) ("[T]o infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom. . . . Although academic freedom does not include 'the freedom to discriminate', . . . [academic] freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee[s]' . . . ; their role was simply to root out discrimination") (citations omitted).

proffered reliance upon a particular, ascertainable employment criterion could reliably be verified through such comparisons.²⁰ It is also possible that this Court might craft successfully some heightened proof standard—along the lines suggested by the First, Second, and Seventh Circuits—under which plaintiffs could prove pretext through comparative evidence only where the evidence revealed such clearly unequal treatment that the university's interests in legitimate self-governance could not possibly be implicated.

It is apparent, however, that the approach adopted by the Third Circuit in *Bennun* leaves colleges and universities vulnerable to judicial findings of liability (and potentially intrusive remedial orders²¹) wherever there are superficial similarities in the *curricula vitae* of successful and unsuccessful candidates. The only escape allowed by *Bennun* is for universities effectively to abandon the searching, though highly subjective, peer review sys-

²⁰ For example, if a university claimed to withhold a promotion on grounds of an ironclad rule that all candidates must hold a terminal degree in their field, evidence that the university had promoted nonminority candidates without such degrees could reliably be used to suggest the university's reason was pretextual. Cf. *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Moreover, there are other methods, not involving comparison of candidate qualifications, by which a complainant could demonstrate that an academic employer's stated reasons were pretextual, including evidence of "[d]epartures from procedural regularity" in the university's decisionmaking process. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984); see also *Kunda*, 621 F.2d at 546 (defendant-university advised only male employees of its terminal-degree requirement, leaving complainant unaware until it was too late to satisfy the requirement).

²¹ See, e.g., *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 359-60 (1st Cir. 1989) (ordering that Title VII plaintiff be instated as a tenured professor over university's protest that "tenure is a significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases . . . because a judicial tenure award mandates a lifetime relationship between the University and the professor"), cert. denied, 110 S. Ct. 3217 (1990).

tem in favor of a system in which each candidate's paper record is "objectively" compared with all those who went before, to ensure perfect and verifiable uniformity among decisions. But a purely objective system would be useless as a device for comparing academic achievement. Moreover, what makes the approach below particularly perverse is that, even assuming *the courts'* ability to discern accurately the objective "competence" of various candidates, it ensures that each new candidate need only be as competent as the least competent previously successful candidate. The adverse impact of that approach is especially revealing here where the research skills of the earlier candidate (Dr. Somberg) were concededly her weakest area of competence, and yet those skills became the benchmark for measuring the merit of the next candidate (Dr. Bennun), whose research skills were concededly his strongest area of competence. Because academic talents are by their nature extremely diverse, some heightened proof of disparity among candidates more properly balances the competing interests of academic freedom and antidiscrimination.

* * * *

"The courts have struggled with the problem [of how to scrutinize a university's assessment of faculty qualifications without infringing legitimate values of institutional autonomy] since Title VII was extended to the university, and have found no solution." *Namenwirth*, 769 F.2d at 1243. Indeed, six years after the Seventh Circuit issued that lament, a comparison of the two most recent court of appeals decisions—the First Circuit's *Villanueva* decision and the Third Circuit's *Bennun* decision—confirms that, if anything, the circuits have staked out even more conflicting approaches.

This Court's review of the important issues presented by the application of the *McDonnell Douglas* framework to the academic employment setting is urgently needed to resolve the enduring conflicts among the various circuits.

In addition, this Court's review is warranted to consider whether the sort of judicial intervention into faculty tenure and promotion decisions approved by the Third Circuit in *Bennun* is compatible with the First Amendment's "special concern" for the university's "right to determine for itself on academic grounds who may teach."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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December 19, 1991